

70262-9

70262-9

NO. 70262-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

BRANDON WILLIAM DENNIS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The State challenges Findings of Fact number 19, specifically, the trial court's finding that the AR-15 assault rifle was seized from a bedroom different than the master bedroom the defendant had exited just before being detained. The evidence clearly shows the weapon was recovered from the same bedroom the defendant had just exited.

2. The State challenges Conclusions of Law numbers 1, 3 and 4, specifically, that while the sheriff's deputies lawfully entered the defendant's residence under the community caretaking exception to the warrant requirement, the deputies exceeded the scope of the exception by conducting a brief walkthrough of the house looking for other persons—injured, hiding or otherwise—and for any firearms that were in plain view.

**B. ISSUES PRESENTED**

1. Did the trial court err in finding that sheriff deputies were not allowed to conduct a cursory protective or safety sweep of the defendant's residence after they had lawfully entered the residence in response to a report that the defendant was threatening suicide and that he was armed with or possessed firearms?

2. Did the trial court err in finding that the assault rifle was found in a bedroom other than the master bedroom the defendant was seen exiting, where the only evidence shows the assault rifle was found behind the bedroom door of the master bedroom?

3. Did the trial court err in suppressing evidence, a handgun and assault rifle, observed in plain view by deputies lawfully inside the defendant's residence performing a community caretaking function?

4. Did the trial court err in dismissing the case of unlawful possession of a firearm based on the court's incorrect legal ruling suppressing the evidence of the case?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with Unlawful Possession of a Firearm in the First Degree. CP 41-45. Prior to trial, the court heard a CrR 3.6 motion wherein the defendant argued that the guns that constituted the sole evidence of the charged crime should be suppressed. RP.<sup>1</sup> The court ruled in the defendant's favor and suppressed evidence of the guns recovered by the police while the

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<sup>1</sup> The verbatim report of proceedings consists of a single volume, dated 3/26/13, and will be referred to simply as RP.

deputies were in the defendant's home trying to prevent him from harming himself or others. CP 40, 46-49. With the sole evidence of the case having been suppress, the court dismissed the case against the defendant pursuant to RAP 2.2(b)(2). CP 40. The State filed a timely notice of appeal. CP 50-51.

**2. SUBSTANTIVE FACTS FROM THE CRR 3.6  
SUPPRESSION HEARING**

On September 5, 2012, dispatch for the King County Sherriff's Office received a report that the defendant was at a residence in the unincorporated area of Issaquah, intoxicated, screaming suicidal threats, saying he was going to shoot himself, and possibly waving a gun around. RP 7, 11, 44-45. When deputies arrived at that location, it was determined that the defendant had departed the residence in a truck that was registered to him, with his listed address being 26423 227<sup>th</sup> Ct SE in the city of Maple Valley. RP 45-46, 70. Dispatch relayed this information to the Maple Valley precinct, wherein three deputies were directed to do a welfare check at the defendant's residence to determine if he was present and whether he posed a threat to kill or harm himself or others. RP 7, 12-13. Deputies Robert Kearney, Corey Baldwin and Devon Stratton responded.

In route, along with the above information, the deputies learned that the defendant had posted "FTW" on his Facebook page. RP 47. The deputies knew that "FTW" meant "Fuck the World." RP 47. It was also learned that he was a convicted felon, registered sex offender, and that the reporting party had indicated that the defendant owned and possessed firearms. RP 47-48. Adding to the deputies concerns was the knowledge that persons in such situations can act irrationally, can have a low regard for other people's safety, can harm others before harming themselves, and that at times, suicidal individuals will attempt "suicide by cop." RP 82, 38-39.

When the deputies arrived at the defendant's residence, they noted that his truck was parked in the driveway, that the engine was still warm indicating that he had just arrived home, and that the garage doors were wide open. RP 9. The deputies knocked on the front door multiple times and announced their presence. RP 9. There was no response other than a dog inside the house began running around and barking. RP 9.

The deputies walked around the outside of the house and peered into the windows to see if they could see whether anyone was inside or anyone needed help. RP 9, 49, 84. The deputies

observed no one. RP 9, 49, 84. The deputies then entered the open garage and knocked on the interior door several times and announced their presence. RP 10, 49. Once again the deputies received no response. RP 10, 49. The deputies then opened the unlocked door and yelled out, identifying themselves yet again and informing anyone inside that they were about to enter the residence. RP 10, 49. The deputies then entered the residence to conduct a safety and welfare check of the defendant and anyone else inside the residence. RP 9, 49, 83-84.

While Deputies Kearney and Baldwin checked the main floor, Deputy Stratton kept an eye on the stairway leading to the upper floor. RP 85. Things then happened "so quick." RP 75. Deputy Stratton saw the defendant walk out of the master bedroom at the top of the stairs. RP 85. It appeared to Deputy Stratton that "something was wrong" with the defendant. RP 85.

Because the original call indicated that the defendant was suicidal and that he was possibly armed with a gun, he was immediately placed into "protective custody," i.e., he was handcuffed for his safety and the safety of everyone else in the residence until the situation was resolved. RP 11, 50, 86. The defendant was then placed on the couch. RP 12. The ultimate

goal was to talk with the defendant to determine whether he was suicidal and/or needed to be involuntarily committed to a hospital so that he could be evaluated by a mental health professional (MHP). RP 12-13.

Before any evaluation of the defendant could be done and before asking him a single question, Deputies Baldwin and Kearney continued with a quick "safety search" to make sure no one else was in the house who could pose a threat, was hurt, or who could provide the deputies with further information about the defendant's condition. RP 14, 32, 86. In the few moments this was going on, Deputy Stratton stayed with the defendant, but he did not inquire of him at all because he needed to be able to listen and be able to respond to the Deputies Baldwin and Kearney as they finished their safety check. RP 86. The deputies indicated that they had no idea if anyone else was in the house, whether anyone else even lived in the house -- including children, or if there were any accessible firearms. RP 13-14, 95. The immediate concern was "to make sure it was a safe environment for all of us." RP 40.

In conducting this quick safety sweep, Deputies Baldwin and Kearney walked into the master bedroom, the bedroom from which the defendant has been observed exiting. RP 14, 50, 94. Deputy

Kearney immediately observed the muzzle of a handgun sticking out from underneath a blanket on the bed. RP 15. He retrieved the gun and made it safe by ejecting the round that was in the chamber and removing the fully loaded magazine. RP 15-16. The deputies indicated that they would have seized the gun for safekeeping until the defendant could be properly evaluated by a mental health professional, but in this case, the defendant was also a convicted felon who could not legally possess a firearm. RP 75.

While standing next to the bed, the deputies also observed a military style ballistics vest by the TV stand, and a full-sized semi-automatic AR-15 assault style rifle leaning against the wall behind the open bedroom door. RP 17-18, 87.

After confirming that nobody else was in the house, Deputy Baldwin asked the defendant about what had happened earlier in the day. RP 52. The defendant said that he had no idea what the deputy was talking about. RP 52. Asked if he was suicidal, the defendant responded, "No, I am okay with what's going to happen." He also told the deputy that "I was a good man, don't stop doing my job, and that he will be okay. And when this is done, don't worry about him," he was "at peace and will be at peace when it happens." RP 55. He added that he "hope that everyone that he

loved will understand when it happens.” RP 55. Deputy Baldwin “believed these were suicidal statements.” RP 55.

The defendant was then transported to the Regional Justice Center, booked on a charge of felon in possession of a firearm, and where he would be evaluated by a mental health professional. RP 52, 54, 75-76. During the booking process, Deputy Baldwin put the defendant in touch with a MHP. RP 78.

The defendant did not present any evidence and did not testify at the CrR 3.6 hearing. RP 96-98.

The trial court held that the deputies were legally justified in entering the residence as part of their community caretaking function. RP 123-25. The entry was not a pretext, the court ruled. “I believe on the fact[s] that we have the officers were, in fact, concerned that Mr. Dennis may be in there and harmed himself.” RP 123.

However, the court ruled that once the defendant was handcuffed and sitting on the couch, the community caretaking function was at an end. RP 124-25. The deputies had no “reasonable belief” that there was anyone else in the residence and no “reasonable belief” that anyone needed medical assistance or had been harmed. Id. Instead of conducting a safety check of the

house, the court ruled, if the deputies were concerned for their safety, they should have just taken the defendant outside. RP 125. While a safety check may have “made them feel better,” the court ruled that the deputies were not justified in conducting any type of protective sweep and thus the evidence seized—the two guns—was suppressed. RP 126. The court then dismissed the case pursuant to RAP 2.2 and the State appealed. RP 127; CP 50-51.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED WHEN IT RULED THAT OFFICERS WERE NOT ALLOWED TO DO A CURSORY SEARCH OF THE DEFENDANT’S RESIDENCE**

There is no question that the deputies here had the lawful authority to enter the defendant’s residence without a warrant as part of their community caretaking function to investigate whether he was inside the residence, whether he was suicidal or whether he had actually harmed himself or others and needed assistance. This is what we want our police officers to do, and the trial court was correct in its ruling in this regard. The question for this Court is whether the permission to enter is so limited in scope that officers are not even permitted to do a cursory search for other persons – persons who may have been harmed, persons who may pose a

threat to the defendant or the deputies, or persons who may have pertinent information about the defendant's mental condition -- or to locate the firearm that could pose a threat to themselves, the defendant, or others in the residence -- including children.

Considering that officers are allowed to conduct just such a limited cursory search when they have placed a person under arrest, it is unreasonable to hold that deputies acting in a much more dynamic situation, such as existed here, do not possess the same abilities to handle the situation when performing a legitimate community caretaking function as they do upon placing a person under arrest.

The United States and Washington constitutions prohibit most warrantless searches of homes. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Police may only search without a warrant under one of the few carefully drawn exceptions to the warrant requirement. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). One such exception is the community caretaking function, which is divorced from a criminal investigation. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

The community caretaking exception "allows for the limited invasion of constitutionally protected privacy rights when it is

necessary for police officers to render aid or assistance or when making routine checks on health and safety.” Id. The exception recognizes society’s desire to enable police officers to fully and safely assist its citizens in certain situations. State v. Ibarra-Raya, 145 Wn. App. 516, 522, 187 P.3d 301 (2008), reversed on other grounds, 172 Wn.2d 880 (2011). Still, such an invasion is allowed only if (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. Thompson, 151 Wn.2d at 802. “Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a community caretaking function.” Id. (citing Kalmas v. Wagner, 133 Wn.2d 210, 216–17, 943 P.2d 1369 (1997)). The court must be satisfied that the exercise of the community caretaking function is not a mere pretext for conducting an evidentiary search. State v. Schroeder, 109 Wn. App. 30, 37, 32 P.3d 1022 (2001).

Here, the trial court correctly found that the officers were properly exercising their community caretaking function in entering the defendant's residence after they had received information that he was potentially suicidal, possibly armed with a firearm, and the facts suggested that he had recently arrived home but that he was not responding to the deputies attempts to contact him. On this point, there can be no debate. The deputies had had no prior contact with the defendant and they were not investigating any crime. Rather, the deputies were responding to the defendant's residence based on a call that the defendant had been making threats to kill himself, was potentially suicidal and potentially armed. Once lawfully inside the residence, the question becomes, what abilities did the deputies have to carry out their community caretaking function completely and safety for all involved.

If the deputies had placed the defendant under arrest for having committed a crime or on a warrant, they would have been permitted to conduct what is called a "protective sweep." Police officers may conduct a protective sweep of premises for security purposes as part of the lawful arrest of a suspect. State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing Maryland v. Buie, 494 U.S. 325, 334–35, 110 S.Ct. 1093, 108 L.Ed.2d 276

(1990)). The scope of such a sweep is limited to a visual inspection of only those places where a person may be hiding. Hopkins, 113 Wn. App. at 959. An officer need not justify his actions in searching the area that immediately adjoins the place of the arrest. Id. If officers seek to extend a sweep to outlying areas of the residence, the officers must be able to point to articulable facts, which, taken together with rational inferences from those facts, warrant a reasonable belief that the area involved in the protective sweep may harbor an individual who poses a danger to those on the scene. Id.

State v. Sadler<sup>2</sup> is illustrative in regards to the scope of a protective sweep. K.T. was a 14-year-old girl who had disappeared from a foster home. On September 12, 2004, the Clark County Sheriff's Office was contacted by a private organization reporting that they had tracked K.T.'s recent Internet activity to a particular internet provider (IP) address. The police then tracked the IP address to Sadler's residence in Pierce County. The Pierce County Sheriff's Office was then requested to attempt contact with K.T. at Sadler's residence. They possessed the following information: K.T. had disappeared from a foster home two weeks earlier, she

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<sup>2</sup> 147 Wn. App. 97, 193 P.3d 1108 (2008), rev. denied, 176 Wn.2d 58 (2013).

might have met someone via the Internet, she was possibly trying to pass as a 19-year-old, and she may be involved in sadomasochistic sexual activity. 147 Wn. App. at 119.

Two officers responded to Sadler's address. After knocking several times, Sadler answered the door and said that K.T. was upstairs sleeping. Sadler and one officer went upstairs where K.T. was found, partially naked, sleeping or unconscious in a bed surrounded by various bondage equipment. During this time, the other officer was downstairs looking for other persons to ensure officer safety. Sadler was then placed into custody at the top of the stairs near the bedroom.

After Sadler was placed under arrest, the other officer continued with his security sweep, which he characterized as a "routine" activity. The officer entered into a different room up near the bedroom and observed numerous sexual devices and video camera equipment. The officer also checked the closets to make sure no one was inside. The officer had no specific reason to suspect anyone else was in the residence.

Sadler moved to suppress the evidence discovered in his residence claiming that the officers' initial entry into his residence without a warrant was unlawful, and even if the initial entry was

lawful, the security sweep conducted by the officers exceeded the scope of the entry. The court rejected both claims.

First, the court upheld the initial warrantless entry under the community caretaking exception. The court held that the officers had reason to believe that K.T. might be inside the residence and in need of assistance. Sadler, 147 Wn.2d at 123-25. Second, the court upheld the protective sweep of the residence that occurred after the defendant was placed under arrest. Id. at 125-26. The court stated that Sadler was taken into custody just outside the upstairs bedroom where K.T. was found, and the protective sweep did not extend beyond the adjoining rooms and the floor below where Sadler was detained for a period of time. Id. There was nothing in the record, the court noted, that indicated the search went beyond a cursory visual inspection of only those places where someone could be hiding. Id.; see also State v. McAlpin 36 Wn. App. 707, 715-718, 677 P.2d 185 (officers allowed to conduct a warrantless search of defendant briefcase under the community caretaking function after he was placed in custody and it was learned he had been waiving a gun around in a restaurant), rev. denied, 102 Wn.2d 1011 (1984).

Further, “[o]nce the [community caretaking function] exception does apply, police may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter have been fully dispelled.” Kinzy, 141 Wn.2d at 388. Washington courts have rejected the argument that offices exercising the community caretaking exception must use the least intrusive means to achieve their community caretaking role. State v. Hos, 154 Wn. App. 238, 248-249, 225 P.3d 389, rev. denied, 169 Wn.2d 1008 (2010).

In another situation, when officers take a mentally unstable person into civil custody pursuant to RCW 71.05.150, the officers may conduct a warrantless search in the exercise of the police community caretaking function. State v. Dempsey, 88 Wn. App. 918, 922, 947 P.2d 265 (1997); State v. Lowrimore, 67 Wn. App. 949, 957, 841 P.2d 779 (1992); State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). A search under such a situation goes beyond the mere searching for weapons to protect the officers from harm while they complete their task and investigation. Dempsey 88 Wn. App. at 924. A civil custody search has as one of its purposes

the protection of not only the officers involved, but the affected individual and other persons who may come into contact with him while aid is being rendered. Id. “This exception permits a warrantless search to whatever extent is objectively reasonable to carry out the police caretaking function, given the circumstances reasonably perceived by the officer at the scene at the time.” Id. (citing State v. Lynd, 54 Wn. App. 18, 21–22, 771 P.2d 770 (1989)). During an intervention, “the officer may search for any dangerous instrumentality. There need only be “some reasonable basis to associate the emergency with the place searched.” Id. (internal citations omitted).

Whether having placed someone under arrest, taken them into custody on a civil commitment, or performing a community caretaking function, officers are allowed to do a cursory search of the immediate vicinity to ensure their own safety, the safety of the person under their control, and any other person in the immediately area. As a society, we ask our officers to perform certain functions; the law allows them carry out that function in a safe manner. Here, one merely has to ponder what could have happened to understand that the law allowed the deputies to do a cursory search of the bedroom the defendant had just exited.

The deputies were responding to a potentially suicidal person armed with a firearm(s). The deputies had never come in contact with the defendant before. The deputies testified about the propensity of persons committing "suicide by cop," and about how suicidal persons can act quite irrationally. The deputies testified that they had no idea if other persons lived at the residence or were present. The deputies also had no idea where the firearm or firearms were that they had been informed the defendant possessed.

When the defendant was first observed and taken into custody, it is unknown if the deputies initially knew that the person they had in custody was the defendant, the person they were looking for. But in any event, one merely has to imagine other scenarios that could have occurred had the defendant not been a convicted felon and subsequently placed under arrest for unlawful possession of a firearm. What if the deputies could not determine if the defendant was suicidal and they had to release him – with a handgun and assault rifle still in the bedroom. What if the deputies had departed the residence with the defendant and there had been children in the home – with a fully loaded handgun sitting on the bed and an assault rifle behind the door. What if the person they

initially had taken into custody wasn't the defendant, that the suicidal person was still in the bedroom – with a handgun and assault rifle.

Even under the court's theory – that the deputies were immediately required to take the defendant outside to conclude their community caretaking function, problems still exist. First, as stated above, officers are not limited or restricted to engaging in what a court may later determine was the least intrusive way of conducting their community caretaking function. Hos, 154 Wn. App. at 248-249.<sup>3</sup> Second, even in removing an individual from a residence, officers should be able to “watch their backs.” Deputies should not be required to put themselves and the person in custody at unknown risk, the risk of someone coming out of a bedroom with a firearm, rather than allowing such a cursory search as occurred here.

The trial court here erred in so limiting the scope of the deputies' exercise of their community caretaking function that they put themselves, the defendant, and the public at risk. The law does

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<sup>3</sup> It is also highly suspect that requiring the immediate removal of the defendant from the residence was the least restrictive and desirable outcome. Certainly taking an individual from a residence allows for the greater possibility of escape. It also subjects the person to the exposure of the weather, the neighbors and any other parties or persons who may be outside.

not place such a sever restriction on the deputies' actions. The cursory search here was lawful.

## **2. THE ASSAULT RIFLE WAS DISCOVERED IN THE MASTER BEDROOM**

A trial court's findings of fact will be upheld if they are supported by substantial evidence. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id.

Here, the trial court mistakenly entered finding of fact 19 that indicated the AR-15 assault rifle was obtained “[f]rom *another* bedroom” other than the bedroom where the handgun and bullet proof vest were discovered — the master bedroom the defendant had just exited. CP 48 (emphasis added). The sole evidence on this point is to the contrary. The deputies were in the master bedroom looking at the handgun they discovered on the bed when they observed the bullet proof vest at the foot of the bed, and the assault rifle leaning up against the wall behind the door of the bedroom. See RP 17-18, 87-88. There is no evidence the deputies discovered any firearms in any other room other than the master bedroom.

**3. THE DEPUTIES WERE LAWFULLY PERMITTED TO SEIZE THE FIREARMS THAT WERE IN PLAIN VIEW**

Here, when the deputies observed the firearms in plain view in the defendant's bedroom, and their presence in the bedroom was lawful under their community caretaking function, the deputies were permitted to seize the firearms under the "plain view" exception to the warrant requirement. Under the "plain view" exception to the warrant requirement, an officer is permitted to seize an item of obvious evidentiary value that is in plain view if the officer is lawfully in the area in which the item is observed. State v. Seagull, 95 Wn.2d 898, 901–02, 632 P.2d 44 (1981); State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). The exception has three elements: (1) a prior justification for the police intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) the immediate knowledge by the police that the item seen is incriminating. McAlpin, 36 Wn. App. at 713-14 (citing Washington v. Chrisman, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) and State v. Lair, 95 Wn.2d 706, 630 P.2d 427 (1981)).

All three of these elements are present here. The deputies were in the residence performing a community caretaking function, the cursory search of the house was permissible within the scope of performing a community caretaking function, the firearms were observed in plain view and because the deputies had learned before entering the residence that the defendant was a convicted felon, the firearms were of obvious evidentiary value because the defendant could not lawfully possess the weapons. Thus, the trial court erred in suppressing the firearms and dismissing the case for lack of evidence.

**E. CONCLUSION**

For the reasons cited above, this Court should reverse the trial court's ruling suppressing the evidence obtained in this case – the firearms – and remand the case back to the Superior Court for trial.

DATED this 23 day of September, 2013.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jesse Corken, the attorney for the respondent, at JRC Practice, P.L.L.C., 119 1<sup>st</sup> Avenue South, Ste 260, Seattle, WA 8104-3450, containing a copy of the Brief of Appellant, in STATE V. BRANDON DENNIS, Cause No. 70262-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

09-23-13  
Date