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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

BRIEF OF RESPONDENT

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1. INTRODUCTION

The Respondent, Brandon Dennis, through his attorney, Jesse Corkern of the law firm JRC Practice, PLLC, requests the court affirm the trial court's rulings.

2. STATEMENT OF THE CASE

Mr. Dennis was charged with Unlawful Possession of a Firearm in the First Degree. CP 41-45. On March 26th, 2013, the Honorable Mariane Spearman presided over an evidentiary hearing held pursuant to CrR 3.6. RP. On September 5th, 2012, officers just coming on shift were made aware of a suicidal subject who had been screaming suicidal threats and possibly waving a firearm around. RP 5, 6, 7. The officers who testified at the evidentiary hearing did not respond to the location from which the call was made, but were aware other officers had responded to that location and had advised dispatch to recommend contact at Mr. Dennis' residence. RP 8. Deputies Kearney, Baldwin and Stratton responded to Mr. Dennis' residence for the purposes of performing a welfare check. RP 7, 8, 44, 46, 81. All three deputies entered the house without a warrant. RP 10. While two of the Deputies were searching the residence for Mr. Dennis, Deputy Stratton observed the defendant emerge from a bedroom on the third level of the residence. RP 85. Mr. Dennis was immediately detained. RP 85. Deputy Stratton, who detained Mr.

Dennis, made no inquiries into Mr. Dennis' health or welfare. RP 93. The other deputies searched the remainder of the house after Mr. Dennis had been detained. RP 14, 86. Mr. Dennis was taken outside. RP 86, 87. While Mr. Dennis was detained for his own welfare, Deputy Baldwin entered the bedroom from which Mr. Dennis had emerged and discovered a firearm partially absconded by a blanket. RP 15. Deputy Stratton, who had been stationed with Mr. Dennis while he was detained, was requested to assist by bringing his camera to take photographs of the newly discovered firearm. RP 87. While in the room to photograph the firearm Deputy Stratton observed a ballistic style vest or body armor as well as an AR 15 assault rifle. RP 87. After Mr. Dennis had been detained none of the Deputies requested permission to search the remainder of his home. RP 42, 68, 93. Upon Mr. Dennis' detention , the danger of Mr. Dennis hurting himself had been alleviated. RP 65. The Deputies had no information suggesting anyone else was in the house. RP 67.

3. ARGUMENT

Exceptions to the warrant requirement that judicial approval must precede entry to a residence are “narrowly drawn and jealously guarded”. *State v. Porter*, 102 Wn.App. 327, 330 (2000). Warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution. *State v. Kinzy*, 141

Wn.2d 373, 384, 5 P.3d 668 (Wash. 2000). However, there are exceptions to this requirement. *Id.* The community caretaking function, which is divorced from the criminal investigation, is one such exception to the warrant requirement. *Kinzy.* at 385. Washington cases have expanded the community caretaking function exception to encompass not only the "search and seizure" of automobiles, but also situations involving either emergency aid or routine checks on health and safety. *Kinzy*, at 386. Both situations may require police officers to render aid or assistance. But compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion. *Id.* Such 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. *Id.* at 386-87.

Kinzy, is the seminal case in Washington State regarding the community caretaking exception to the warrant requirement. In *Kinzy*, law enforcement officers contacted a youthful looking girl they believed to be between the ages of 11 and 13 in a high narcotics trafficking area of downtown Seattle. When

the officers attempted to contact the youthful looking female, she put her head down and attempted to walk away. She was then restrained by officers and patted down for weapons. Officers found a hard object which was discovered to be a comb. Officers then had Ms. Kinzy keep her coat open and they viewed what they believed to be flecks of cocaine. After the flecks returned positive for cocaine upon being field tested, Ms. Kinzy admitted to having more cocaine in her bra. *Kinzy* at 378, 379. In *Kinzy*, The Washington Supreme Court laid out the analysis for the community care taking exception to the warrant requirement as detailed above. In a previous case, the Washington State Supreme Court stated that "[w]hether an encounter made for noncriminal, non-investigatory 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 [92 P.3d 233] caretaking function.'" *Kalmas v. Wagner*, 133 Wash.2d 210, 216-17, 943 P.2d 1369 (1997). The court applied that analysis to the facts in *Kinzy*, and differentiated the analysis based on whether and individual had been seized. "If a person has not been 'seized', balancing the interests usually results in favoring the action by police." *Kinzy* at 387. When a person has been seized, balancing the interests does not necessarily favor an encounter by police...as that persons interests in being free from

police intrusion are no longer minimal. *Kinzy*, at 388.

Courts have also recognized that the emergency doctrine must be strictly construed so as to keep the warrantless intrusion as limited as possible. The community caretaking function exception should be cautiously applied because of its potential for abuse. Once the 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*, at 395.

In *Kinzy*, the court held found that “[c]autious application of the community caretaking function exception leads to our conclusion that the post-seizure action by the officers against [Ms. Kinzy] was unreasonable. [The State’s] interest in protecting the safety of children did not outweigh [Ms. Kinzy’s] interest in her constitutional freedoms...” *Id* at 396. The concurring opinion by Justice Madsen focuses intently on the exceptions potential for abuse, the need for its cautious application, and emphasizes the important factual analysis of whether the reasons for the initial encounter have been dispelled. *Kinzy* at 396, 387 (Madsen, J. concurring).

In Mr. Dennis’ case, the trial court followed the analysis of *Kinzy* and correctly found that once the officers confirmed that the

defendant did not need emergency aid they had no justification to continue the search of Mr. Dennis' residence and the deputies exceeded the scope of the community caretaking exception when they searched the defendant's home. The evidence is undisputed that the officers entered Mr. Dennis' home for the purposes of a welfare check. Upon seeing Mr. Dennis emerge from a 3rd floor bedroom, and detaining Mr. Dennis on the 2nd floor, officers could clearly determine that Mr. Dennis was not armed nor in need of aid. However, no inquiries were made regarding Mr. Dennis' welfare, the purported reason for being in his house without a warrant in the first place. Instead Mr. Dennis was detained in handcuffs and his home was searched. Deputies did not even bother attempting to obtain consent from Mr. Dennis.

The petitioner hypothesizes about what the Deputies could have done had Mr. Dennis' been placed under arrest. But such an analysis is not factually analogous. Mr. Dennis was not placed under arrest. He was detained for officer safety. He was certainly seized, but was not under arrest until after officers had searched his home while he was detained. Therefore the protective sweep that the petitioner suggest is applicable, is in fact, only applicable upon lawful arrest.

The petitioner also relies on *State v. Sadler*, 147 Wn. App 97

(2008), rev. denied, 176 Wn. 2d 58 (2013). In *Sadler*, the court held that officers were lawful in the entry of the home and did not exceed the scope of the community caretaking exception to the warrant requirement when officers conducted a cursory visual inspection of the defendant's home after placing the defendant under arrest. *Sadler* at 126. The *Sadler* court relied on *State v. Hopkins*, 113 Wash.App. 954 (2002), for purposes of analyzing a protective sweep. *Id* at 125. In *Hopkins* the court found that police may conduct a protective sweep of the premises for security purposes as **part of the lawful arrest of the suspect**. *Hopkins*, at 959 (emphasis added). But the court significantly limited the scope of the sweep to "a visual inspection of only those places where a person may be hiding". *Id* at 959. The court found that a sweep of the area immediately adjoining the place of arrest need not be justified, but "if the sweep extends beyond the immediately adjoining area, the officer 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 and individual who poses a danger to those on the scene." *Id* at 959, 960. A general desire to ensure no other individuals are present is insufficient to justify an extended protective sweep. *Id* at 960.

Again, the facts of *Sadler* and the resulting analysis are not

analogous to Mr. Dennis' case. First, Mr. Dennis was not lawfully arrested. As the testimony clearly indicates, he was detained for officer safety. Second, the sweep was not limited in scope as *Hopkins* requires. The Deputies went up the stairs and entered a bedroom for which they had no reason to believe contained anyone. Only after entering the bedroom, with Mr. Dennis detained, did they discover contraband which was ultimately suppressed. This was well beyond the cursory visual inspection contemplated by *Hopkins*. In *Sadler*, the officers had reason to believe a young woman who had been reported missing was with Sadler. They also had information to believe she was involved in sadomasochistic sex, was inside the home of a much older man, and that man took a long time answering the door and was profusely sweating when he finally did. *Sadler* at 124. The *Sadler* court found that the protective sweep was not excessive in scope because nothing in the record indicated the search went beyond a cursory visual inspection. *Sadler* at 126. In Mr. Dennis' case, the deputies entered a bedroom, on a separate floor from which they detained Mr. Dennis and removed a blanket and looked behind a door before discovering contraband. This is well beyond the cursory visual protective sweep contemplated by *Hopkins*.

Finally, the petitioner analogizes Mr. Dennis' case with

custodial situations under the auspices of RCW 71.05.150. That particular statute is not relevant in Mr. Dennis' case. The case relied on most strongly by the petitioner, in this regard, is *State v. Dempsey*, 88 Wn.App. 918 (Wash.App. Div 3. 1997). In *Dempsey*, police responded after Dempsey's parents had called authorities because Mr. Dempsey had been threatening them. The responding officer, on his second visit, observed Mr. Dempsey to be paranoid, volatile and physically aggressive. Mr. Dempsey had also admitted to recent drug use. Mr. Dempsey was searched prior to being placed in the patrol car for transportation to Sacred Hart Medical Center for an involuntary mental health evaluation. During the search a bindle of methamphetamine was found on Mr. Dempsey. *Dempsey* at 921.

Mr. Dennis was never detained or evaluated for purposes of an involuntary commitment. In fact, officers never evaluated him at all. Although a search under RCW 71.05 falls within the community caretaking exception to the warrant requirement, a basis for an involuntary commitment must be established before a protective search is authorized. *State v. Lowrimore*, 67 Wn. App 949 (1992). Therefore, RCW 71.05 is not applicable in Mr. Dennis's case as Mr. Dennis was never evaluated for an involuntary commitment. Regardless, *Dempsey* is factually distinguishable as the bindle of methamphetamine was found on Mr. Dempsey's person, while the

weapons found in Mr. Dennis' house were located in a bedroom on a different floor. Clearly, the "protective sweep" in Mr. Dennis case was much more expansive.

Additionally, the petitioner challenges fact finding number 19. The respondent agrees the weapon was found in the bedroom.

The petitioner suggests that officers discovered the weapons in plain view. There is no testimony to support this. In Mr. Dennis' case it is clear from the testimony that the officers had to enter Mr. Dennis' bedroom before discovering any contraband. As discussed above, it is the respondent's position, and that of the trial court, that the officers exceeded the scope of the community caretaking exception to the warrant requirement. Only if this court finds in petitioner's favor as to that question, would we reach the plain view argument. In that case the proper procedure would be to remand to the trial court for that determination.

4. CONCLUSION

For the reasons above, this court should affirm the trial court's ruling that the law enforcement officers exceeded the scope of the community caretaking exception to the warrant requirement resulting in the suppression of all evidence obtained as a result of the unlawful search and the dismissal of Mr. Dennis' charges.



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I certify under penalty of perjury under the laws of the State of Washington that on this date I mailed a copy of the document to which this certificate is affixed, with postage prepaid, to

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Dated: January 24, 2014

A handwritten signature in black ink, appearing to read 'Jesse Corkern', is written over a faint circular stamp or watermark.

Jesse Corkern WSBA 38226