

70338-2

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NO. 70338-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVE HOVANDER AND
STARLARE HOVANDER
Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable IRA J. UHRIG, JUDGE

APPELLANTS' **CORRECTED** OPENING BRIEF

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2015 OCT 28 PM 2:53
COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

Steven and Starlare Hovander, husband and wife, appeal their conviction for manufacturing marijuana. The issues on appeal arise from the denial of a motion to suppress the fruits of a search warrant, and the admission of statements made by Starlare Hovander after her arrest.

The motion should have been granted because the search warrant and its supporting documents were neither placed before the court nor adequately reconstructed, and because any probable cause the warrant may have contained was the product of the officers' warrantless trespass which violated the Hovanders' privacy rights under Art. I § 7 of the Washington Constitution.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred by denying the defendants' motion to suppress the fruits of the search warrant served at defendants' residence on May 27, 2011.

No. 2: The trial court erred by admitting Mrs. Hovander's statements without considering whether the taint of the prior unlawful search had been dissipated.

No. 3: The trial court erred by entering the following findings of fact:

FINDINGS OF UNDISPUTED FACT No. 7: The deputies then went to the adjoining Chair 9 restaurant where they used its telephone to secure a search warrant. From the time they left their parked vehicles until they retreated from the front door of the middle cabin, the deputies did not open a gate, climb over a fence or *walk past or observe any signs restricting public access to their location. Their route was impliedly open to the public and they acted in the manner of any reasonably respectful member of the public who might be visiting or transacting business at the cabin.* (Italicized text is objected to).

DISPUTED FACTS: Finding 1: Were there any No Trespassing or Private Property signs or barriers across the driveway when the deputies walked up to the driveway on My 27, 2011?

Answer: No. The signs and barrier must have been missing on that evening.

Issues Pertaining to Assignments of Error

1. A hearing was held under CrR3.6 seeking suppression of the fruits of a search warrant. The only evidence of the contents of the supporting affidavit was testimony of the searching officers. Is this adequate reconstruction upon which to uphold the issuing judge's finding of probable cause to search? (Pertains to Assignment of Error 1).

2. With no warrant police entered the defendants' remote rural partially wooded private land at dusk on May 27, 2011. Prior to attempting to contact the occupants they wandered freely around the property for about 15 minutes, sniffing, peering in windows and peering through a hole

in a residence door created by the absence of a door handle. Did the police disturb the defendants in their private affairs without authority of law? (Pertains to Assignment of Error 1.)

3. Was it error for the trial court to admit defendant Starlare Hovander's post-arrest statements without considering whether the taint of the prior unlawful search had been dissipated? (Pertains to Assignment of Error 2).

4. Are the findings and conclusions to which The Hovanders have objected supported by substantial evidence? (Pertains to Assignment of Error 3).

III. Statement of the Case

Procedural History

The Hovanders were charged by Information in Whatcom County Superior Court Cause Nos 11-1-00648-7 (Starlare) and 11-1-00647-9 (Steven) filed June 2, 2011. (CP: 6).

The Hovanders filed a suppression motion, ("3.6"),{CP¹} which was heard on November 26, 2012 and January 22, 2013. The court found Mrs. Hovander's statements admissible under CrR3.5. (CP: 65). The 3.6 motion was then denied and the case proceeded to trial before the judge on a stipulated record.

¹ As of this date, this document has not been given its CP number, but Defendant/Appellants' motion to suppress was docket item #28

On April 9, 2013 the trial court entered its Findings and Conclusions for the 3.6 and 3.5 motions and the stipulated trial. (CP: 68). Both defendants were found guilty as charged. (CP: 73). Judgment and Sentence were entered on that day, (CP: 78). This appeal timely follows.

Relevant Facts²

On May 27, 2011 Whatcom County Sheriffs received a tip that marijuana was being grown in a trailer on property owned by the Hovanders, adjacent to Chair 9 Restaurant. (RP1: 24.)³ The location is about 90 miles East of Everett on the Mt. Baker Highway, a remote scenic road that dead ends at about 5000 feet 20 miles East of the Hovander's property.

A team of three officers describing themselves as members of a proactive criminal interdiction team (RP1: 81) drove out to investigate. Arriving at the property at about 7:40 PM, they spread out and roamed freely around the property for about 15 minutes. (RP1: 24, 111, 120). During their exploration they evidently observed no particular boundaries and went where their noses led them. The officers testified they:

² While we dispute the finding that "No Trespassing" signs were not present on the day of the search, we address the arguments below assuming without conceding that this finding is correct. *Our arguments in this appeal rely on the testimony of the officers.*

³ The report of proceedings is in two volumes, dated 11.26.12 (hereinafter "RP1) and 1.22.13 (hereinafter "RP2." This counsel's copy of RP1 was not numbered, so I have added numbers with page 1 being the cover page.

-Walked through the woods, (RP1: 24).

-Looked through a hole in the door where the handle was missing to attempt to observe the interior of one of the residences (“cabins”) on the property. (RP1: 32).

-Walked through the wooded area in back of the cabins. (RP1: 42; Ex. 7; Finding of Undisputed Fact 4, CP: 69.⁴)

-Walked hundreds of feet onto rural property “sniffing around.” (RP1: 52).

-Peeked in windows right up next to the windows. (RP1: 52).

-Treked across other persons’ property. (RP1: 54).

-Gave things “the sniff test.” (RP1: 56).

-“Poked” around the house. (RP1: 59).

-Viewed the back of the suspected cabin. (RP1: 59).

-Went to the front door of a cabin to make observations but did not attempt to knock or contact the occupants. (RP1: 71).

-Walked around the property and adjacent property without restriction, walking through the woods on a “path” that was also described as a “dirt road.” (RP1: 111).

-Looked around just to see what was there. (RP1: 119).

⁴ The RP refers to this as “Exhibit 67, however there is no exhibit 67 and exhibit 7 appears to be the photo described at RP1: 41.

-Walked around for 10 or 15 minutes, going back “some distance”, finding nothing there but a muddy road. (RP1: 120).

-Did not attempt to contact the occupants until they were done walking around. (RP1. 122).

The supporting affidavit was never produced. The evidence of what was placed before the judge who issued the warrant comes from the testimony of the officers. (RP1: 74).

The Hovanders presented witnesses who testified that the property had been posted on May 27. (RP2: 7; 19; 55). The court chose to believe the state’s witnesses who testified that no postings were present or observed. The court implicitly acknowledged that the Hovanders had taken steps to protect their property but that “[t]he signs and barrier must have been missing on that evening.” (Finding of Disputed Fact No 1 at CP: 71).

IV: ARGUMENT

Standard of Review: The Court of Appeals reviews de novo a trial court's legal conclusions on a motion to suppress. *State v. Boyer*, 124 Wn.App. 593, 102 P.3d 833 (2004).

The Court of Appeals reviews findings of fact in a motion to suppress for substantial evidence. *State v. Ross*, 141 Wn.2d 304; 4 P.3d 130 (2000).

Arguments:

A. The trial court erred in denying the Hovanders' 3.6 motion to suppress the fruits of a search warrant without reviewing the warrant or its supporting affidavit.

The evidence the Hovanders sought to suppress was the fruit of a search warrant. (RP1: 20). The search warrant, its supporting affidavit and its return were never brought before the trial court and are not a part of the record. The record contains no explanation for this omission.

The state assumed the burden of proof and began the hearing by having the officers testify as to their conduct preceding the execution of the warrant. (RP1: 5-128). They stated that the facts to which they had testified constituted the facts placed before the magistrate, (RP1: 74). This was constitutionally deficient.

Where a search warrant affidavit is not before the reviewing court reconstruction is permissible if it provides a reliable reconstruction of the

affidavit. Reconstruction based only upon the testimony of the officers--as opposed to the testimony of the magistrate--is constitutionally inadequate in that it impairs the "court's ability to review the basis of the magistrate's probable cause determination." In *Myers* the *State v. Myers*, 117 Wn2d 332, 344, 815 P.2d 761 (1991) the magistrate did not clearly remember what had been placed before him and the affiant's testimony was considered inadequate to provide fair review. The court observed:

It is impossible to accurately review what the judge considered or found when he issued the warrant to search Myers' house and premises. The only evidence of the telephonic affidavit is the police officers' testimony, offered 4 months after the event, and Officer Hiles' report, made after the search occurred and after the tape that could establish the accuracy of the report was lost. This is not sufficient. We do not presume that any party in this case abused the procedures that govern telephonic warrants, but:

[W]e cannot be unmindful of the possibility that an overzealous law enforcement officer may, subconsciously. . . be tempted to rectify any deficiency in his testimony before the issuing judge by post-search repair

Myers, at 117 Wn.2d 343-44. (Citations omitted).

Since the contents of the affidavit were neither brought before the reviewing court nor adequately reconstructed the fruits of the search must be suppressed. *Myers* at 117 Wn.2d 344.

B. The officers' warrantless search of the Hovanders' property was without authority of law and intruded upon a privacy interest protected by Washington Constitution Article I § 7.

The officers arrived at the Hovander property around dusk. (RP1: 90; RP2: 45). With no intent to contact the residents, they spread out and roamed freely about the property for 10-15 minutes. During that time they passed over areas that were at least arguably impliedly open to the public during daytime hours, (eg, driveway, and front door) and some areas that were private at all times. (eg. side and back of residence, path, dirt road). Only after they had explored the entire property and come upon that which they sought--evidence of an ongoing marijuana garden--did they attempt to contact the owners.

Whether officers have impermissibly intruded depends on the facts and circumstances of the particular case. *State v. Gave*, 77 Wn.App. 333, 337, 890 P.2d 1088 (1995).

Officers looking for evidence of a crime may trespass on private land (without a warrant) to the same extent as a reasonably respectful citizen. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Here they went far beyond what a respectful citizen would do.

While doing so they must attempt to contact the residents immediately, not after roaming around the property and gathering

evidence. *State v. Johnson*, 75 Wn.2d 692, 704, 879 P.2d 984 (1994).

They did not. (RP1: 122).

They may not stray significantly from the direct access to the entry to the residence. *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649, (officers strayed just a few feet); *State v. Boethin*, 126 Wn.App. 695, 698, 109 P.3d 461 (2005). These officers canvassed the entire property, even going into the woods and behind residences.

Even the side yard may not be “impliedly open,” much less the back side of a residence. *See, State v. Hoke*, 72 Wn.App. 869, 866 P.2d 670, (1994). These officers went to the front, the back, the side, and all over the property.

They may not choose particularly intrusive vantage points, such as peering into a window of a residence. *State v. Ross*, at 141 Wn.2d 313. They did. They sniffed, poked, looked in windows and even peeked through a hole in the door.

After reasonable hours the rules change and a warrant or an exigency is required to trespass, even on access routes, particularly in rural areas. *State v. Ross*, 141 Wn.2d at 314. Good citizens don’t wander around at 8:00 at night, at dusk, on rural private property.

Uninvited intruders on rural property risk violent confrontation with irate landowners, *State v. Johnson*, 75 Wn.App. at 708. (Citations omitted).

The court, having ruled that there were no “No Trespassing” signs, failed to address the larger issue—whether the officers’ conduct was constitutionally offensive even absent posted signs. The court assumed that the absence of signs resolved the matter. (RP2: 98). As we have argued above, it did not. The presence or absence of a “No Trespassing” sign is not dispositive on the issue of whether the area is “impliedly open to the public” or a citizen’s privacy has been unreasonably invaded. *State v. Johnson*, at 75 Wn.App. 706 and n6.

Even absent postings, an examination of the totality of the circumstances establishes that the officers’ conduct failed to pass constitutional muster. The Hovanders have established a reasonable expectation of privacy that would include an expectation that the officers would not do what they did when they did it absent a warrant, and that the officers invaded their Article I § privacy rights.

C. The court improperly admitted Mrs. Hovander's statements.

If the initial entry was lawful, the court's ruling on this issue could be sustained. If the entry was not lawful the state bears the burden to establish that the taint of that coercive unlawful conduct has been dissipated. *State v. Eserjose*, 117 Wn.2d 907, 915, 259 P.3d 172 (2011). The record contains no evidence to support a finding that the taint has been dissipated. The defendant's lawyer failed to argue the taint issue, and the judge did not consider it. Once the 3.6 motion was denied the taint issue would have been all but moot, but here the court decided the 3.5 prior to ruling on the 3.6 motion.

The state can argue that it had no opportunity to put on its proof since the matter was mooted by the denial of the 3.6 motion. We agree. Should this court reverse the 3.6 holding, a remand would be necessary to address the 3.5 issue, should the state decide it can proceed without the fruits of the search.

D. The trial court erred in entering the following findings:

FINDINGS OF UNDISPUTED FACT No. 7: The deputies then went to the adjoining Chair 9 restaurant where they used its telephone to secure a search warrant. From the time they left their parked vehicles until they retreated from the front door of the middle cabin, the deputies did not open a gate, climb over a fence or walk past or observe any signs restricting public access to their location. *Their route was impliedly open to the public and they acted in the manner of any reasonably respectful member of the public who might be visiting or transacting business at the cabin.*

(Italicized text is objected to.)

Despite its characterization as “undisputed,” we respectfully dispute the italicized portion of this finding. This is at best a mixed conclusion of fact and law, and is the primary issue of the appeal, as argued above.

DISPUTED FACTS: Finding 1: Were there any No Trespassing or Private Property signs or barriers across the driveway when the deputies walked up to the driveway on My 27, 2011?

Answer: No. The signs and barrier must have been missing on that evening.

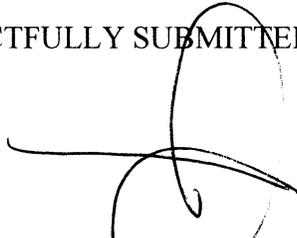
The Hovanders concede that this finding is supported by substantial evidence, and will not be disturbed on appeal. They do not concede that the finding is correct.

V. CONCLUSION

For the foregoing reasons defendants' 3.6 motion should have been granted. The trial court should be reversed.

DATED this 8th day of October, 2015.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line extending to the left and a vertical line extending upwards from the top of the 'S'.

Jeffrey Steinborn
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of the document entitled Appellants Opening Brief on the following:

Via First Class U.S. Mail;

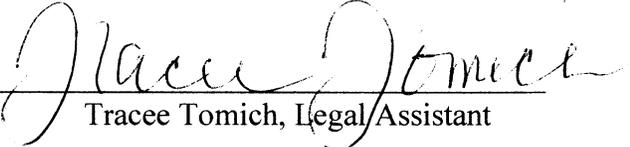
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DATED this 5th day of October, 2015.


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