

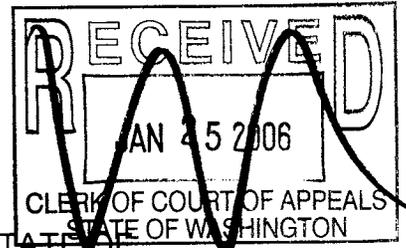
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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 33614-6-II



IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GLEN N. McGUIRK,

Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENT OF ERROR

1. The trial court erred in concluding that Mr. McGirk's motion to suppress evidence pursuant to CrR 3.6 should be denied.

(Conclusion of Law No. V)

2. The trial court erred in finding that a backpack was located next to Mr. McGuirk incident to arrest. (Finding of Fact

No. V)

3. The trial court erred in concluding that Mr. McGuirk's movements and gestures conveyed consent for Detective Keeler to enter the hotel room. (Conclusion of Law No. II)

4. The trial court erred in concluding that Detective Keeler had a reasonable belief that Mr. McGuirk had given him permission to enter the hotel room. (Conclusion of Law No. II)

5. The trial court erred in concluding that the State established Mr. McGuirk's consent for Detective Keeler to enter the room by clear and convincing evidence. (Conclusion of Law No. III)

6. Insufficient evidence was presented for a finding of guilt of the charges of identity theft.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

A. Under Washington State law, does a trial court's error in concluding a search of a hotel room was permissible as a search incident to arrest when law enforcement searched a closed bag when the defendant was handcuffed and seated at the direction of law enforcement at the time of the search? (Assignment of Error No. 1)

B. Does a trial court commit error by finding that a backpack was located next to Mr. McGuirk when the evidence presented at the hearing did not clearly indicate that the backpack was near Mr. McGuirk at the time of the arrest? (Assignment of Error No. 2)

C. Under Washington State law, does a trial court commit error by concluding that clear and convincing evidence was provided indicating Mr. McGirk gave consent to enter the hotel room when law enforcement did not seek his consent to enter the room and Mr. McGirk merely walked away after he answered the door to the hotel room? (Assignments of Error Nos. 3, 4, 5)

D. Under Washington State law was sufficient evidence presented warranting a conviction when the evidence did not show

that three alleged victims were either living or dead as required by statute?

III. PROCEDURAL HISTORY

Mr. McGuirk was charged by way of the First Amended Information of the following crimes: Attempted Identity Theft in the Second Degree; three counts of Identity Theft in the Second Degree; Possession of Stolen Property in the First Degree; four counts of Unlawful Possession of Payment Instruments; four counts of Possession of Stolen Property in the Second Degree; and three counts of Forgery. (CP 33)

Mr. McGuirk presented a Motion to Suppress Evidence pursuant to Criminal Rule 3.6. (CP 14, RP 03/08/2005). The Motion to Suppress Evidence was denied. (RP 03/17/2005 at 4) Mr. McGuirk filed a Motion for Reconsideration which was denied by the Trial Court. (CP 32) A Stipulated Facts trial followed. (RP 07/22/2005, CP 140) Mr. McGuirk was found guilty of thirteen (13) out of the seventeen (17) counts contained in the Amended Information. (CP 140) This appeal follows.

IV. STATEMENT OF THE CASE

Detective Keeler testified at the Suppression Hearing.

(RP 03/08/2005 at 3 - 24) Detective Keeler had been looking for Mr. McGuirk to investigate check forgeries occurring in the area.

(RP 03/08/2005 at 3 - 4) Detective Keeler received information indicating that Mr. McGuirk was at a hotel with Toni Caruthers.

(RP 03/08/2005 at 4) Hotel management reported Mr. McGuirk was in a room registered to Toni Caruthers. (RP 03/08/2005 at 13)

Ms. Caruthers paid for the room. (RP 03/08/2005 at 13) Detective Keeler was given the room number of Ms. Caruthers' room.

(RP 03/08/2005 at 4) The hotel management believed

Ms. Caruthers was in the room with Mr. McGuire and informed Detective Keeler of such (RP 03/08/2005 at 18)

Detective Keeler knocked on the door of Ms. Caruthers' room. (RP 03/08/2005 at 6) A male voice responded to the knocking and asked who was there at the door. (RP 03/08/2005 at 6) The door was opened by Mr. McGuirk. (RP 03/08/2005 at 7) Detective Keeler told Mr. McGuirk that he needed to speak with him. (RP 03/08/2005 at 16) Mr. McGuirk backed away from the door then turned and walked into the hotel room. (RP 03/08/2005

at 16) Detective Keeler followed Mr. McGuirk into the room.

(RP 03/08/2005 at 7, 16) Mr. McGuirk was arrested a couple of feet inside the door. (RP 03/08/2005 at 7) Detective Keeler described the location of the arrest as follows:

A: I arrested him right where the little hallway ended and the room opened up.

(RP 03/08/2005 at 9) The arrest was made immediately upon Detective Keeler's entry into the hotel room. (RP 03/08/2005 at 8 - 9) Mr. McGuirk was handcuffed and placed in a chair at the end of the hallway. (RP 03/08/2005 at 9)

Detective Keeler searched the hotel room after handcuffing and sitting Mr. McGuirk down in a chair. (RP 03/08/2005 at 9) Detective Keeler saw backpacks upon his entry into the room. (RP 03/08/2005 at 8) Detective Keeler opened the backpack to search its contents. (RP 03/08/2005 at 9) Detective Keeler found checkbooks, credit cards, identification and social security cards in the backpack. (RP 03/08/2005 at 9) The items found were not in Mr. McGuirk's name. (RP 03/08/2005 at 9)

A female was also in the hotel room. She was sitting on the bed in the room. (RP 03/08/2005 at 9) Detective Keeler advised Mr. McGuirk of his Miranda Rights sometime after Mr. McGuirk's

arrest. (RP 03/08/2005 at 9) Detective Keeler did not advise Mr. McGuirk of his right to refuse consent for Detective Keller to enter the room. (RP 03/08/2005 at 18) Detective Keeler did not recall informing Ms. Caruthers of her right to refuse consent. (RP 03/08/2005 at 23 - 24)

V. ARGUMENT

A.. Under Washington State law, does a trial court's error in concluding a search of a hotel room was permissible as a search incident to arrest when law enforcement searched a closed bag when the defendant was handcuffed and seated at the direction of law enforcement at the time of the search?

Challenges to Conclusions of Law are reviewed do novo. State v. Madarash, 116 Wn.App. 509, 66 P.3d 682 (2003) In this case, the court denied the motion to suppress evidence. (CP 20)

Mr. McGuirk has automatic standing to challenge the search of the motel room where he was arrested because he was charged with crimes containing the element of possession. State v. Jones, 146 Wn.2d 328 (2002) A hotel guest has the same expectation of privacy as a renter or owner of a residence. State v. Davis, 86 Wn.App. 414, 133 Wn.2d 1028 (1997) A guest in a hotel room is

entitled to Constitution protections against unreasonable searches. Stoner v. State of California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed. 2d 856 (1964); United States v. Stevenson, 396 F.3d 358 (4th Cir. 2005)

The Fourth Amendment to the United States Constitution guarantees the right of people to be secure in their persons and effects against unreasonable searches. U.S. Const. Amend IV. Article One Section Seven of the Washington Constitution provides that warrantless searches are per se unreasonable unless the search falls within a specific exception to the warrant requirement. Warrantless searches are per se unreasonable subject to a few established exceptions. State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) Unreasonable searches and seizures are prohibited by RCW 10.79.040. The reasonableness of the search is examined by balancing the State's interest in conducting the search against the intrusion on the defendant's expectation of privacy. State v. McKinnon, 88 Wn.2d 75, 558 P.2d 781 (1977); Seattle v. Mesiani, 110 Wn.2d 459, 755 P.2d 775

(1988) The State has the burden to prove the warrantless search falls within an exception. RCW Const. Art. 1 § 7; State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)

A search incident to arrest is generally limited to areas immediately within the arrestee's control at the time of arrest. Chimel v. California, 395 U.S. P-2, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) U.S.C.A. Const. Amend 4; RCW Const.Art. 1 § 7 A search incident to arrest exception to the warrant requirement applies only when the search is limited in time and place in relation to the arrestee. State v. Smith, 88 Wn.2d 127 (1977) The scope of the area of the search may not be expanded because of third persons in room. State v. Keyser, 29 Wn.App 120, 627 P.2d 978 (1981)

In the case of Chimel v. California, 395 U.S. 752 (1969), the court recognized a search incident to an arrest as an exception to the search warrant requirement. The Chimel, *id.*, case, the court justified the search under a need to search for weapons over which an arrestee could gain access (officer protection) and the need to search for destructible evidence that the arrestee could possibly access. Chimel v. California, *id.*

In the case of United States v. Blue, 78 F.3d 56 (2nd Cir. 1966), the court reviewed a situation similar to that in the present case. In that case, two persons were under arrest; lying on the floor with their hands cuffed behind their backs. Law enforcement lifted a mattress as a search incident to arrest. The court found that the search was improper.

A search incident to arrest does not violate the Fourth Amendment if: 1) the object searched was in the immediate control of the arrestee at the time of the arrest, and; 2) the search was reasonable considering the events after the arrest but before the search. State v. Smith, 119 Wn.2d 675 (1992); State v. Jordan, 92 Wn.App. 25 (1998) An object is in the control of an arrestee if the object was within the arrestee's reach immediately prior to, or at the moment of the arrest. State v. Jordan, 92 Wn.App. 25 (1998)

A greater expectation of privacy is extended to possessions such as purses and luggage. State v. White, 44 Wash.App. 276, 279, 722 P.2d 118, 121 (1986)

This case is distinguishable from the case of State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992) In that case the defendant had been wearing a fanny pack that fell off the defendant during a

scuffle that occurred when law enforcement arrested Mr. Smith. The search of the fanny pack was upheld as a search incident to arrest because the search was contemporaneous to the arrest and the defendant was wearing the pack immediately prior to arrest.

The facts in this case differ from the Smith, *supra*, case. In this matter, no evidence was presented suggesting that Mr. McGuirk wore or carried the backpack before the arrest. Detective Keeler testified that Mr. McGuirk opened the door to the hotel room and the backpack was seen immediately after entry into the room. (RP 03/08/2005 at 7)

In the case of State v. Jordan, 92 Wn.App. 25, 960 P.2d 149 (1998) the search of the defendant's pockets was a permissible search incident to arrest. The pockets were within the defendant's reach at the time of the arrest.

Unlike the Jordan case, the evidence or findings do not indicate that the backpack was in Mr. McGuirk's immediate reach at the time of arrest. The testimony does, however, support a conclusion that the backpack was not in Mr. McGuirk's control immediately prior to the arrest. Mr. McGuirk walked to the door and was arrested near the door. (RP 03/08/2005 at 7)

This case is comparable to the case of State v. Turner, 114 Wn.App. 653, 59 P.3d 711 (2002) In that case the defendant challenged a search performed incident to arrest. The findings of fact and evidence failed to indicate the distance between the defendant and the truck searched incident to arrest. The general term near was used to describe the proximity. The court held that the trial court could not conclude the truck was within the defendant's control at the time of the arrest. Since the record was silent on the distance between the defendant and the truck, the trial court could not make the finding of immediate control which is necessary to the search incident to arrest exception. State v. Turner, 114 Wn.App. At 659.

The search of the backpack in this case does not fall within the search incident to arrest exception to a warrant requirement. The State has the burden to establish that the search was permissible under law. State v. Turner, *supra*. The State failed to meet that burden in this case.

The record and findings of fact in this matter do not establish the required proximity between Mr. McGuirk and the maroon backpack. Detective Keeler did not indicate that Mr. McGuire was

either wearing or carrying the backpack at the time of arrest.

Detective Keeler saw backpacks in the room when he followed Mr. McGuire into the hotel room. (RP 03/08/2005 at 8) Detective Keeler describes his search:

A: I did a search of the room, quick search of just the immediate area just right around him, and opened up a maroon backpack.

(RP 03/08/2005 at 9) As in the case of State v. Turner, supra, the record is ambiguous regarding the location of the backpack.

The evidence does not establish the proximity of the backpack to Mr. McGuire at the time of the search. Nor does the evidence establish that the backpack was near Mr. McGuire at the time of arrest. Mr. McGuire was handcuffed and moved to a chair following arrest. (RP 03/08/2005 at 9) Even if Detective Keeler's statement described above is interpreted to suggest that the backpack was near Mr. McGuire at the time of the search, the evidence does not indicate if the backpack was in the close proximity to Mr. McGuire prior to being placed in a chair. The change in Mr. McGuire's location caused by law enforcement should not modify the area in which a search incident to arrest.

The scope of the search should be determined by the location of the defendant at the time of the arrest. Chimel v. California, *supra*

Additionally, the search of the backpack was unreasonable following the analysis of the case of Chimel v. California, *supra*.

Mr. McGuire was handcuffed and seated at the time of the search.

(RP 03/08/2005 at 9) It was impossible for Mr. McGuire to either gain access to a weapon or destroy evidence from the closed backpack. Mr. McGuire had a significant expectation of privacy in the closed bag as well as the hotel room itself. The circumstances of the search compel the conclusion that the search was unreasonable and unlawful.

B. Does a trial court commit error by finding that a backpack was located next to Mr. McGuirk when the evidence presented at evidence presented at the hearing did not clearly indicate that the backpack was near Mr. McGuirk at the time of the arrest?

A trial court's findings of fact are reviewed under the substantial evidence test. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) In this case, the court made Finding of Fact No. V which reads as follows: "That incident to arrest a backpack was

located next to the defendant.” (CP 20 - 22) However, as previously stated, the actual testimony that finding was based upon is ambiguous. As Detective Keeler stated:

A: I did a search of the room, quick search of just the immediate area just right around him, and opened up a maroon backpack.

(RP 3/8/05 at 9) The testimony of Detective Keeler does not clearly indicate that the backpack was next to Mr. McGuirk. Detective Keeler appears to be describing his actions in the hotel room in order of occurrence and does not clearly indicate that the backpack was located by Mr. McGuirk. The trial court’s findings were not supported by the evidence presented at the hearing.

C. Under Washington State law, does a Trial Court commit error by concluding that clear and convincing evidence was provided indicating Mr. McGirk gave consent to enter the hotel room when law enforcement did not seek his consent to enter the room and Mr. McGirk merely walked away after he answered the door to the hotel room?

1. The evidence presented did not establish by way of clear and convincing evidence that Mr. McGuirk’s consented to Detective Keeler entering the hotel room.

Consent to a search is an exception to the warrant requirement. State v. Rodriguez, 20 Wn.App. 876, 582 P.2d 904 (1978) However, the State must establish the voluntariness of consent allowing law enforcement to enter by clear and convincing evidence. State v. Nelson, 47 Wash.App. 157, 163, 734 P.2d 516 (1987) The State must prove the defendant's consent was the product of free will and not merely a submission to authority. State v. Werth, 18 Wn.App. 530, 574 P.2d 941 (1977) The determination if consent was voluntarily given is a question of fact determined by examining the totality of the circumstances. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)

In determining if consent is given, the Court is to consider to totality of the circumstances including an analysis of the factors: 1) whether Miranda warnings were given prior to consent; 2) the education and intelligence of the consenting person; 3) whether the consenting person had been advised of his right to refuse to consent, and; 4) if the person is in police custody at the time consent was sought. State v. Dennis, 16 Wn.App. 771, 700 P.2d 382 (1985).

The Washington State Constitution provides great protection to the privacy of citizens in their homes. State v. Johnson, 104 Wn.App. 409, 415, 16 P.3d 680, *review denied*, 143 Wn.2d 1024, 25 P.3d 1020 (2001); State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) As stated previously in this brief, a hotel room is comparable to a private residence.

The Washington State Constitution provides more protection to privacy rights than the Fourth Amendment to the United States Constitution. State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2001) It is well settled that Article I, Section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. State v. Jones, 146 Wn.2d at 332, *referring to State v. Hendrickson*, 129 Wn.2d 61, 69, 917 P.2d 563 (1996); State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Williams, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984)

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Article I, Section 7 Washington State Constitution

Under this provision, the State may not unreasonably intrude upon a person’s private affairs. State v. Borland, 115 Wn.2d 571,

577, 800 P.2d 1112 (1990); State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)

The Court examines six factors in determining if the Washington State Constitution provides greater protection of privacy rights as outlined in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) The factors include an examination of the 1) textual language; 2) textual differences; 3) constitutional and common law history; 4) preexisting State law; 5) structural differences; 6) matters of particular state or local concern. State v. Gunwall, 106 Wn.2d at 61-62, 720 P.2d 808. Factors 1, 2, 3 and 5 have been previously considered. Washington State Constitution, Article 1, Section Seven. Only factors four and six need to be examined as those factors require examination in light of the facts of a specific case. State v. Russel, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) *citing* State v. Borland, 115 Wn.2d at 576, 800 P.2d 112, *cert. Denied*, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)

An analysis of the fourth factor set forth in Gunwall, *supra*, demonstrates that the prior Washington case law has given significance to privacy interests of residences. Many Washington cases have held that Article I, Section 7 provides greater privacy

protections than the Fourth Amendment. See City of Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988) (*citing* State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980); State v. Young, 123 Wn.2d at 188, 867 P.2d 593; State v. Borland, 115 Wn.2d at 578, 800 P.2d 1112; State v. Gunwall, 100 Wn.2d 814, 818, 676 P.2d 419 (1984); State v. Chrisman, 100 Wn.2d 814, 818, 676 P.2d 419 (1984) As specified in the case of State v. Young, 123 Wn.2d at 185, 867 P.2d 593 and State v. Chrisman, 100 Wn.2d at 820, 676 P.2d 419.

“In no area is a citizen more entitled to privacy than in his or her home. The closer offers come to intrusion into a checking, the greater the constitutional protection.”

Id.

The case at hand concerns privacy interests in entering and subsequently searching hotel rooms. As previously stated, the privacy interests in a hotel room are no less significant than the privacy interests awarded to a private residence. An independent review of this matter under Article I, Section 7 is warranted.

The next step in the Gunwall analysis is of whether the privacy interest is a matter of State or local concern. State v. Gunwall, 106 Wn.2d at 620, 720 P.2d 808. This State has awarded

its citizens a heightened protection against unlawful intrusions into private residences. State v. Chrisman, 100 Wn.2d at 822, 676 P.2d 419. As indicated in the case of State v. Ferrier, 137 Wn.2d at 114, the sixth factor of the Gunwall analysis suggests independent review of Article I, Section Seven when reviewing a claim of lack of consent to enter and subsequently search a residence.

Consequently, it is evident that Article I, Section Seven of the Washington State Constitution provides greater protections of individual privacy rights than the United States Constitution. Therefore any interference with the right to privacy should be closely examined and Mr. McGuirk should be given the broader protection provided by Washington State law as the cases previously cited in this brief indicate.

A non-consensual entry into a residence to make a routine felony arrest without an arrest warrant or extrinsic circumstances to a violation of the Fourth Amendment. Payton v. New York, 445 U.S. 573 (1980) Searches and seizures without a warrant that occur inside a home are presumptively unreasonable. Payton v. New York, 445 U.S. at 586, 100 S.Ct. 413 at 1380, 63 L.Ed.2d 639 (1980); State v. Bell, 108 Wash.2d 193, 196, 737 P.2d 254; State v.

Daugherty, 94 Wash.2d 263, 266-67, 616 P.2d 649 (1980), *cert denied*, 450 U.S. 958, 101 S.Ct. 1417 The Eleventh Circuit Court held that police cannot enter a home to arrest an individual without a warrant. U.S. v. Bulman, 667 F.2d 1374 9 Fed.R. Evid. Serv. 1425 (11th Cir. 1982) The case of State v. Dresher, 39 Wn.App. 136, 692 P.2d 846 (1984) also supports the assertion that an arrest warrant is required to enter a home in the absence of consent or exigent circumstances.

A warrant is required to enter a home of a third person to conduct an arrest. Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) In that case, law enforcement entered the defendant's home to arrest a third person believed to be staying in the home. Law enforcement had an arrest warrant for the third person. A warrantless search is valid under the Fourth Amendment only if, valid consent was given. Schneckloth v. Busta Monte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984)

The facts of this matter do not suggest that Mr. McGuirk consented to entry into the hotel room. Denial of the admittance of law enforcement may be implied from a lack of response. State v.

Garcia-Hernandez, 67 Wn.App. 492-495, 837 P.2d 624 (1992)

Opening the door to determine who is at the door does not amount to consent. State v. Counts, 99 Wn.2d 54, 64, 659 P.2d 1087 (1983)

The four factors to be utilized in determining if voluntary consent was given support a conclusion that Mr. McGuirk did not give voluntary consent. First, Mr. McGuirk did not receive Miranda warnings until Detective Keeler arrested him. (RP 03/08/2005 at 9 - 10) Second, there was no testimony presented on the issue of Mr. McGuirk's education and intelligence. Thirdly, Mr. McGuirk was not advised of his right to refuse consent. (RP 03/08/2005 at 17-18) Finally, Mr. McGuirk was not in custody until Detective Keeler was already in the room. (RP 03/08/2005 at 9-10) An analysis of the factors support a conclusion that voluntary consent was not given.

This case is unlike the facts presented in State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999) In that case law enforcement accompanied an INS agent to the defendant's home to assist in serving a deportation order. In that case the defendant stopped back from the open door and did not

object to the officer's entry into his residence. State v. Bustamante-Davila, 138 Wn.2d at 981 The facts of this case do not support an assertion of implied consent.

In this case Mr. McGuirk did open the door, but he walked back into the room. (RP 3/8/05 at 16) As Detective Keeler testified:

Q: You described in your report that when he opened the door, you told him that you needed to speak to him and in your report you specifically stated, "He backed away from the door."

A: Right.

Q: So he backed up a couple of feet?

A: He backed up, then kind of turned around and walked into the hotel room and I followed him in.

Q: But you stated in your report that he just backed away. You didn't make any statement that he turned around. He wasn't running or anything, was he?

A: No

(RP 03/08/2005 at 16)

The actions of Mr. McGuirk reveal an acquiescence to authority rather than implied consent. As Detective Keeler testified, Mr. McGuirk "kind of turned around". (RP 03/08/2005 at 16). Detective Keeler followed Mr. McGuirk into the room. (RP

03/08/2005 at 16) Mr. McGuirk did not imply consent to enter. Mr. McGuirk did not imply consent to enter. Mr. McGuirk may have been simply attempting to leave law enforcement behind in the hallway. The State is unable of meeting its burden to establish consent in this case. Given the deference to privacy rights in this State, it is evident that the entry and subsequent search of the hotel room was a violation of Mr. McGuirk's right to privacy.

Detective Keeler made the choice to follow Mr. McGuirk into the room. (RP 3/8/2005 at 16) Mr. McGuirk did not have the opportunity to object Detective Keeler's entry as he was arrest just inside of the door to the room. (RP 3/8/2005 at 8 - 9) Free and voluntary consent cannot be found by a showing of acquiescence to claimed lawful authority. United States v. Shaibu, 920 F.2d 1423, 1426 (9th Cir. 1990); State v. Browning, 67 Wash.App. 93, 98, 834 P.2d 84 (1992)

This case is extinguishable from the case of State v. Khounvichai, 149 Wn.2d 557, 69 P.3d 862 (2003) In that case the court held that *Ferrier* warnings were not necessary when seeking to enter a residence for the purpose of questioning an occupant of the home. State v. Khounvichai, 149 Wn.2d at 566. In this case

law enforcement had motivations to enter beyond questioning Mr. McGuirk. Detective Keeler testified that he went to the hotel with the intent to arrest Mr. McGuirk. (RP 03/08/2005 at 11) The Detective would have known that a search incident to arrest would have occurred. The motivations of law enforcement went beyond questioning Mr. McGuirk but also to arrest and search.

This case is also distinguishable from the cases of State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000) In that case law enforcement had a warrant for the arrest of an individual in that home. The tenant of the apartment gave explicit verbal permission for the officers to enter. State v. Williams, 142 Wn.2d at 20. To hold that *Ferrier* warnings were not necessary in that situation.

2. Detective Keeler's entry into the hotel room was a violation of Mr. McGuirk's right to privacy because Mr. McGuirk was not made aware of his right to refuse consent to entry.

Law enforcement must advise a person of his/her right to refuse consent to entry and/or search. State v. Ferrier, 136 Wn.2d 103 (1998) Law enforcement must notify an individual that consent is not required, consent may be revoked at any time, and consent

may be limited. State v. Kennedy, 107 Wn.App. 972, 29 P.3d 746 (2001)

In the case of State v. Ferrier, 136 Wn.2d 103, 960 P.2d 727 (1998), the Court analyzed the police procedure known as the “knock and talk”. In that case the Court held that law enforcement must inform of the right to refuse or limit consent to search. State v. Ferrier, 136 Wn.2d at 118-19. This rule applies when law enforcement seeks to search a residence.

In this case, Detective Keeler testified that he intended to arrest Mr. McGuirk. (RP 03/08/2005 at 23) However, the Detective had executed two search warrants previously. (RP 03/08/2005 at 5 - 6)

Detective Keeler did not advise Mr. McGuirk or Ms. Carauthers of their right to refuse his entry into the hotel room. (RP 3/8/2005 at 17 - 18) Although Detective Keeler testified that he intended to arrest Mr. McGuirk (RP 3/8/2005 at 8), the evidence presented in this matter suggests that Detective Keeler actually wanted to search the hotel room for any item related to the suspected check forgery operation. Detective Keeler had previously executed two search warrants. (RP 3/8/2005 at 5 - 6) Many items

were uncovered during those searches including fraudulent Ids and checks. (RP 3/8/2005 at 5) Detective Keeler testified that he believe that he had probable cause to arrest Mr. McGuirk. (RP 3/8/2005 at 18 - 19). However, Detective Keeler did not arrest Mr. McGuirk immediately at the time the door was opened by Mr. McGuirk. Instead, Detective Keeler followed Mr. McGuirk into the hotel room before arresting Mr. McGuirk. (RP 03/08/2005 at 7 - 8) Detective Keeler's motivation for waiting to conduct the arrest was to gain entry into the hotel room for the actual purpose of looking for evidence. Such a purpose is the reasoning behind the necessity to inform individuals of their right to refuse consent to enter. Detective Keeler did not have a warrant for Mr. McGuirk's arrest that would have allowed him to enter the hotel room by force. (RP 3/8/2005 at 4)

No grounds for exigent circumstances to allow search, as Detective Keeler testified that no exigent circumstances existed at the time of entry into the hotel room. (RP 3/8/2005 at 16) The items found in the hotel room should have been suppressed since the search was unlawful.

D. Under Washington State law was sufficient evidence presented warranting a conviction when the evidence did not show that three alleged victims were either living or dead as required by statute?

Evidence is sufficient to support a conclusion when the evidence is viewed in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)

Count II of the information charged Mr. McGuirk with Identity Theft in the Second Degree involving Jeremy Kerr. (CP 33)
Mr. McGuirk was charged with violating RCW 9.35.020(1) and (3).
(CP 33)

The section relevant to this argument is as follows:

a) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1)

The issue before the court is whether the State proved that Swain Leite, George Jefferson or Jeremy Kerr were individuals living or dead. The recent case of State v. Presba, 2005 KIL

3527165 (Wash App. Div. 1 2005) addressed the comparison between the crime of identity theft to obstructing law enforcement. The court found that the crimes were distinguishable because identity theft requires the existence of a real person. The plain language of the statute supports that interpretation of the statute.

The court utilized State's evidence for a stipulated facts trial in determining the guilt of Mr. McGuirk. (CP 43) The evidence does include reference to finding identification documents pertaining to Swain Leite, George Jefferson or Jeremy Kerr. However, the evidence fails to demonstrate that these individuals were real persons. Consequently, insufficient evidence was presented to convict Mr. McGuire of Identity Theft in the Second Degree as charged in Counts II, III and IV of the information. The convictions for those counts should be reversed.

VI. CONCLUSION

For the reasons outlined above, Mr. McGuirk respectfully requests the court to reverse the convictions entered in this matter.

Respectfully submitted this 29 day of January, 2006.



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I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Appellant's Brief in the above-captioned case hand-delivered or mailed as follows:

Original Appellant's Brief Mailed To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

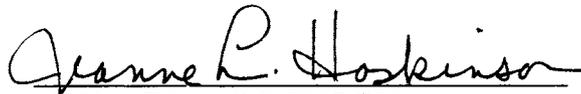
Copy of Appellant's Brief Hand-Delivered To:

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Copy of Appellant's Brief Mailed To:

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DATED this 24th day of January, 2005, at Port Orchard, Washington.


JEANNE L. HOSKINSON
Legal Assistant

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