

NO. 33614-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

GLEN MCGUIRK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01723-6

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 25, 2006, Port Orchard, WA, *Delorean Phares*
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STATUTES

RCW 9.35.02010

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether substantial evidence supports the trial court's finding that the backpack searched incident to arrest was within McGuirk's control at the time of his arrest, where McGuirk was placed in a chair in the immediate location of his arrest and the backpack was right next to him?

2. Whether the trial court properly found that McGuirk allowed Detective Keeler to enter the motel room where he responded to Keeler's request to come in by leaving the door open, and turning and walking into the room?

3. Whether *State v. Ferrier* applies where the police did not employ a "knock and talk" procedure or ask to gain entry for the purpose of searching the motel room?

4. Whether the State failed to prove that the victims of the identity thefts alleged in Counts II, III & IV were real persons, requiring that the associated convictions be vacated? [Concession of error.]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Glen McGuirk was charged by amended information filed in Kitsap County Superior Court with the following:

<u>Count(s)</u>	<u>Offense</u>
I	Attempted first-degree identity theft;
II - IV	Second-degree identity theft;
V	First-degree possession of stolen property;
VI - X	Unlawful possession of payment instruments;
XI - XIV	Second-degree possession of stolen property;
XV - XVII	Forgery.

CP 33-41.

Following the denial of his motion to suppress evidence, CP 20-22, McGuirk agreed to a bench trial on stipulated facts. The trial court found him guilty as charged on all counts except V, XIV, XV and XVI. CP 140-43.

B. FACTS

Sheriff's Detective Timothy Keeler was the only witness at the suppression hearing. He gave the following evidence.

Keeler had been investigating McGuirk for fraudulent checks being cashed at casinos and other places. RP 3.¹ McGuirk was the payee on some of the checks. RP 4. Additionally, other suspects had implicated him in the

¹ Unless otherwise noted, all references are to the report of proceedings of the suppression hearing held on March 8, 2005.

scheme. RP 4. When the police attempted to serve a search warrant to find him, they were informed that he was staying at the Days Inn in Port Orchard. RP 4. The police then asked the management at the motel to contact them if McGuirk showed up. RP 4. The manager contacted Keeler and told him that McGuirk checked in with Toni Caruthers. RP 4. The manager also gave him the room number. RP 4.

When Keeler approached the room, the door was shut. RP 6. He knocked several times and then a male voice asked who was there. Keeler identified himself as a detective with the sheriff's office and told him he needed to talk to him. RP 6-7. McGuirk opened the door, and Keeler said, "Glen, I need to talk to you. I am sure you know what it's all about." RP 7. Keeler may have said, "Mind if I come in?", but was not sure. RP 7. In any event, McGuirk responded by stepping away from the door and walking back into the room. RP 7. McGuirk backed up, then turned around and walked into the room. RP 16. He was not running or anything. RP 16. Keeler followed him a few feet into the room. RP 7. Keeler repeated that he needed to talk to him about the checks. RP 7. McGuirk did not reply, so Keeler told him he was under arrest. RP 7.

When he followed McGuirk into the room, he observed some drug paraphernalia, backpacks, a woman sitting on the bed, some porn videos, a

wallet, and various papers from different ID's. RP 8. The arrest took place in the small vestibule by the door. RP 9. After arresting McGuirk, Keeler had him sit in a chair at the end of the vestibule and then did a "quick search of just the immediate area just right around him." RP 9. Inside a maroon backpack were multiple checkbooks, credit cards, identification cards, and social security cards, none of which were in McGuirk's name. RP 9.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED MCGUIRK'S MOTION TO SUPPRESS. .

McGuirk argues that the trial court in denying his motion to suppress, citing various instances of claimed error. After addressing the standard of review, the State will address the individual claims, none of which has merit.

1. Standard of review.

In reviewing a trial court's denial of a suppression motion, this Court determines whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The Court reviews only those findings of fact to which error has been assigned, treating unchallenged findings as verities on appeal.

Hill, 123 Wn.2d at 644, 647. Conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 772 (1999).

2. *Substantial evidence supports the trial court’s finding that the backpack was within McGuirk’s control at the time of his arrest.*

McGuirk first claims that the trial court erred in finding that the search was properly made incident to McGuirk’s arrest. Because the seized items were within McGuirk’s immediate area, this claim is without merit.

Washington law does not require the police to demonstrate actual exigent circumstances to permit a search incident to an arrest. *State v. Porter*, 102 Wn. App. 327, 334, 6 P.3d 1245 (2000). “It is the fact of arrest itself that provides the ‘authority of law’ to search, therefore making the search permissible under article I, section 7.” *Porter*, 102 Wn. App. at 334 (quoting *State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999)). Where a valid custodial arrest occurs, police officers are not required to weigh whether the totality of the circumstances justifies a search incident to an arrest. *Parker*, 139 Wn.2d at 496-97. The totality of the circumstances will determine, however, the proper scope of the search. *Porter*, 102 Wn. App. at 334.

A search incident to a lawful arrest is allowable under the Fourth Amendment as long as the object searched was within the arrestee’s control

at the time of the arrest and as long as the events occurring between the arrest and the search did not render the search unreasonable. *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992). Contrary to McGuirk's apparent argument, the arrestee does not have to be in actual physical possession of the object later searched as long as it was within reach just prior to the arrest. *Smith*, 119 Wn.2d at 681.

Here, Keeler testified without contradiction that he only searched the area immediately around McGuirk. The evidence further showed that Keeler arrested McGuirk at the end of the vestibule where it opened up into the room. RP 9. McGuirk was then seated in a chair located in the same place. RP 9. The end of the bed was visible from the small vestibule, although the rest of the room was not. RP 17. Keeler's report, which was admitted at the CrR 3.6 hearing, RP 25, indicates that the backpack was "sitting next to where MCGUIRK was seated." CP 81. From this evidence, the trial court could have reasonably concluded that the backpack, which was on the bed, was within McGuirk's immediate reach at the time of the arrest, which it did. CP 21 (FOF V). McGuirk fails to show that the trial court's finding was not supported by substantial evidence. This claim should be rejected.

3. ***The trial court properly found that McGuirk allowed Keeler to enter the motel room where he responded to Keeler's request to come in by leaving the door open, and turning and walking into the room.***

McGuirk next contends that his arrest was improper because he did not consent to Keeler's entry into the room. Contrary to McGuirk's contentions, the evidence supports the trial court's finding that he consented to Keeler's entry by turning and walking into the room, while leaving the door open behind him.

If the person answering the door is in a position to communicate refusal of admittance, and circumstances surrounding the warrantless entry "are such that [police officers] can reasonably conclude [they are] not being refused entry, then no invitation, express or implied, is necessary to make the [officers'] entry lawful." *State v. Raines*, 55 Wn. App. 459, 462, 778 P.2d 538 (1989), *review denied*, 113 Wash.2d 1036 (1990) (*quoting State v. Sabbot*, 16 Wn. App. 929, 937-38, 561 P.2d 212 (1977) (alterations the Court's)); *accord, United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993). Following this rule, this Court rejected a claim materially indistinguishable from McGuirk's:

When Officers Kullberg and Boone arrived at Looney's apartment, they requested permission to enter "to look around". Looney made no objection, but stepped aside as if to allow them to enter. This affirmative act in response to a request to enter amounted to more than mere acquiescence to entry. Looney was in a position to communicate an objection

to the officers' entry if the officers misunderstood her affirmative gesture. Looney's failure to expressly object to the officers' entry in these circumstances amounted to an implied waiver of her right to exclude them.

Raines, 55 Wn. App. at 462.

Here, when Keeler asked McGuirk if he could come in, McGuirk responded by turning and walking into the room, leaving the door open behind him. The evidence showed that McGuirk knew who and what Keeler was and why he was there. The trial court properly concluded that McGuirk consented to Keeler's entry. This claim should be rejected.

4. State v. Ferrier does not apply under the present circumstances.

McGuirk finally argues that the evidence should have been suppressed because he was not properly warned of his right to refuse entry under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). The Supreme Court, however, has rejected that argument under circumstances that are materially indistinguishable from those here:

We find that this situation is indistinguishable from [*State v. Bustamante-Davila*], 138 Wn.2d 964, 983 P.2d 590 (1999)]. In this situation, the police officers did not seek to enter Jelinek's apartment to look for contraband or to arbitrarily search a home for a hidden guest. The officers in this case first verified the accuracy of an informant's statement and identified the defendant's vehicle in front of Jelinek's apartment, which allowed the officers to reasonably conclude that Williams was inside. Subsequently, when the officers spoke with Jelinek, the officers did not request permission to search the premises but only asked whether the defendant was

inside. Jelinek told the officers that there was a guest in his home and that he knew the guest by another name. He agreed to allow the police officers to come inside and confirm the identities of the persons inside. Considering the limited purpose of the police entry and that Jelinek acknowledged that he had guests inside, this case does not resemble a “knock and talk” warrantless search that *Ferrier* intended to prevent.

State v. Williams, 142 Wn.2d 17, 27, 11 P.3d 714 (2000).

Here, the police had probable cause to arrest McGuirk. They had reason to believe that he was staying at the Days Inn, but did not approach the room until they had confirmation that he was in fact there. When Keeler spoke with McGuirk, he did not ask to search the room. To the contrary, he told him that he wanted to talk to him. There is simply no evidence that the primary purpose of the visit was to conduct a search for which the police lacked probable cause, which is the essence of the “knock and talk” procedure to which *Ferrier* applies. *Bustamante-Davila*, 138 Wn.2d at 980. *Williams*, rather than *Ferrier* controls. This claim should be rejected.

B. THE STATE FAILED TO PROVE THAT THE VICTIMS OF THE IDENTITY THEFTS ALLEGED IN COUNTS II, III & IV WERE REAL PERSONS, REQUIRING THAT THE ASSOCIATED CONVICTIONS BE VACATED [CONCESSION OF ERROR].

McGuirk next claims that the evidence was insufficient to support his convictions for identity theft under Counts II, III, and IV, because there was no evidence presented that Swain Leite, George Jefferson, or Jeremy Kerr, the victims named in those counts, were real people. He is correct.

McGuirk's legal contention is correct: under RCW 9.35.020, to establish an identity theft the State must prove that the means of identification or financial information involved belonged to a "specific, real person." *State v. Berry*, 129 Wn. App. 59, ¶¶ 16-19, 117 P.3d 1162 (2005). McGuirk is also correct that the State's evidence contained only reference to altered identity cards belonging to Leite and Kerr, CP 82-83, and a check made out to and a driver's license belonging to Jefferson. CP 81. No evidence established that these persons were real. As such McGuirk's convictions for identity theft in Counts II-IV must be vacated.

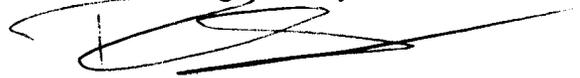
IV. CONCLUSION

For the foregoing reasons, McGuirk's convictions as to Counts II-IV should be vacated and the remaining convictions should be affirmed.

DATED May 25, 2006.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'R. Hauge', is written over the printed name of Russell D. Hauge.

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