

COA No. 35357-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICK JUDGE,

Appellant.

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

The Honorable Susan K. Serko, Judge
The Honorable John R. Hickman, Judge

REPLY BRIEF OF APPELLANT

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2008 JAN -7 PM 5:23

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STATE OF WASHINGTON

COA No. 35357-1-II
STATE OF WASHINGTON
COURT OF APPEALS DIV. #1
JAN 7 2008
BY: [Signature]

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A. ARGUMENTS IN REPLY

1. JUDGE'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE SEARCH WARRANT WAS NOT SUPPORTED BY UNTAINTED INFORMATION SHOWING PROBABLE CAUSE.

a. The Trial Court Erred By Failing To Exclude All Evidence Obtained As A Result Of The Unlawful Search Of The Garage.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). The state agrees police unlawfully searched the attached garage when they peered through its cracks and contacted Judge. Brief of Respondent (BOR) at 22. The state nevertheless contends incriminating evidence subsequently found by police was still admissible under the inevitable discovery doctrine because officers intended to contact Judge before looking into the garage. BOR at 22-23.

The Supreme Court has not yet decided whether the inevitable discovery doctrine applies under article I, section 7 under any set of circumstances. State v. O'Neill, 148 Wn.2d 564, 592 n.11, 62 P.3d 489 (2003). In O'Neill, the Court held article I, section 7 requires an actual custodial arrest before a lawful search incident to arrest can occur because a search cannot occur without "authority of law." Id. at 585. The Court

further held consent could not be used to justify the search because the officer coerced the defendant into giving it. Id. at 591. The state argued the inevitable discovery doctrine applied because it was clear from the record that if the officer had not received consent he would have arrested the defendant anyway, at which point he would have conducted a search incident to arrest. Id. at 591-92. The Court rejected the state's argument, concluding the inevitable discovery rule could not be applied because there would be "no incentive for the State to comply with article I, section 7's requirement that the arrest precede the search." Id. at 592.

The inevitable discovery doctrine is inapplicable in Judge's case for the same type of reason. Application of the rule would provide no incentive for police to comply with article I, section 7's requirement that police must have probable cause to search a citizen's house or the areas intimately associated with the house. See State v. Posenjak, 127 Wn. App. 41, 52, 111 P.3d 1206 (2005) (garage, like home, is constitutionally protected area); Los Angeles Police Protective League v. Gates, 907 F.2d 879, 884-85 (1990) (attached garage treated same as house for purpose of Fourth Amendment protection).

Using the state's logic, police may lawfully search a constitutionally protected area so long as further investigation yields incriminating evidence, regardless of whether there is any justification for

the initial intrusion into a person's private affairs. The state's approach allows the inevitable discovery doctrine to swallow the exclusionary rule. Without an immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded, the protections of Article I, section 7 are unacceptably eroded. State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982). The Supreme Court recognizes "the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions." Id. at 110. "Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." Ladson, 138 Wn.2d at 359-60 (citation omitted). "[O]ur constitutionally mandated exclusionary rule 'saves article 1, section 7 from becoming a meaningless promise.'" Id. at 359 (citation omitted).

Judge's privacy was unreasonably violated in this case because, as found by the trial court, police did not have probable cause to spy into Judge's attached garage. Article 1, section 7 requires "that whenever the right is unreasonably violated, the remedy must follow." White, 97 Wn.2d at 110. To hold otherwise would strip citizens of their protections under

article I, section 7 and force this Court to "become knowingly complicit in an unconstitutional exercise of power." State v. Day, __ Wn.2d __, 168 P.3d 1265, 1268 (2007).

The Court of Appeals has held the inevitable discovery doctrine is compatible with article I, section 7 protections under certain limited circumstances. State v. Richman, 85 Wn. App. 568, 577-78, 933 P.2d 1088 (1997). Under the rule adopted by the Court of Appeals, "[e]vidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State can prove by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery, and the evidence would have been inevitably discovered under proper and predictable investigatory procedures." State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000).

The reasonableness rule safeguards against the fear that police will purposefully ignore proper investigatory procedures in their quest to ferret out crime. Richman, 85 Wn. App. at 577. "[B]y analyzing the reasonableness of the officer's actions in light of the privacy interest at stake, courts can ensure that application of the inevitable discovery doctrine does not erode the protections of article I, section 7." Id. at 578. Even under the test adopted by the Court of Appeals, the inevitable discovery doctrine does not apply because officers acted unreasonably by

spying into the garage without probable cause. When an illegal search or seizure is made in the absence of probable cause, the officer fails to act reasonably and the inevitable discovery rule is inapplicable. See State v. Reyes, 98 Wn. App. 923, 931-32, 993 P.2d 921 (2000) (officer failed to act reasonably because he lacked probable cause before conducting unlawful search for drugs in suspect's pockets).

Police are also forbidden from breaking the law in an attempt to accelerate discovery. Id. at 932-33. The state's argument fails for this reason as well. Officers attempted to contact Judge by knocking on the garage and knocking on the front door of the house. Receiving no answer but wanting to further investigate, they peered through the cracks of the garage without probable cause. CP 81. The trial court found the officers "were peering or spying into the garage trying to locate something that might support criminal activity." CP 84 (Reasons for Admissibility or Inadmissibility of Evidence 2). This finding, which is a verity on appeal, shows police were attempting to accelerate discovery of incriminating evidence by looking into the garage instead of waiting for Judge to respond to their knocks. O'Neil, 148 Wn.2d at 571.

To ensure the inevitable discovery doctrine does not undermine the purposes of the exclusionary rule, the state must also show the legal means of obtaining evidence would have been "truly independent" from any

unlawful action. Avila-Avina, 99 Wn. App. at 18. In this regard, the doctrine "allows neither speculation as to whether the evidence would have been discovered, nor speculation as to how it would have been discovered." Id. (citation omitted). The state's contention that officers would have inevitably contacted Judge without unlawfully looking into the garage must fail in light of this legal standard. BOR at 22-23. It is speculation that officers would have contacted Judge had they not unlawfully looked into the garage, at which point they spied Judge and told him to come and speak with them. Before being confronted by police while inside his garage, Judge had not answered an earlier knock on the garage or an earlier knock on the front door of the house. CP 81. It is likely Judge would never have answered had the officers not spied Judge inside his garage and instructed him to come out. It is also speculation as to what the police would have done had they never contacted Judge. The state, which carries the burden of proof, produced no testimony on the issue.

Finally, even under the lesser protections afforded by the Fourth Amendment, the inevitable discovery rule is inapplicable unless there is an ongoing and independent line of investigation untainted by the unlawful technique. United States v. Haddix, 239 F.3d 766, 769 (6th Cir.2001). In Haddix, the court rejected the government's argument that a warrantless

seizure of evidence was admissible under the inevitable discovery doctrine because police could have obtained a warrant but did not do so. Haddix, 239 F.3d at 768. "Under such a theory, evidence that would constitute probable cause for a warrant, even when that evidence's existence is unknown to the police, is inherently destined to be 'inevitably discovered.' Let it be absolutely clear: this is untenable." Id. An independent investigation must be actively pursued *prior* to the occurrence of the illegal conduct. Id.; United States v. Virden, 488 F.3d 1317, 1322-23 (11th Cir. 2007). "Any other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have obtained a valid search warrant had they waited *or obtained the evidence through some lawful means had they taken another course of action.*" Virden, 488 F.3d at 1322-23 (emphasis added).

Similarly, the police in Judge's case could have investigated the odor without unlawfully peering into the garage, but did not in fact do so. The officers' act of spying into the garage was part of the very same investigation that ultimately led to the discovery of incriminating evidence and initiated the cascade of events that revealed further incriminating evidence. The inevitable discovery argument fails under the Fourth Amendment because the police were not engaged in an independent

investigation untainted by unlawful action at the time of their encounter with Judge.

b. Judge's Exercise Of His Right To Refuse Consent To Warrantless Entry Into His Residence Cannot Be Used To Support Probable Cause To Conduct The Search.

After Judge filed his opening brief, the affidavit in support of the search warrant relied on by the trial court was made a part of the trial record. CP 101-16. Examination of the affidavit reveals the trial court, in determining probable cause supported the search warrant, relied on a piece of information never presented to the judge who issued the warrant. Specifically, the trial court cited Judge's refusal to allow the police into his home as evidence supporting probable cause. CP 85 (Reasons for Admissibility or Inadmissibility Of The Evidence 4). The information relied on by the issuing judge includes only those facts stated in Pigman's search warrant affidavit. Pigman's affidavit makes no mention Judge's refusal to consent to the officers' entry into his home.¹ CP 108-09. In determining the validity of a search warrant, the reviewing court considers "only the information that was brought to the attention of the issuing judge

¹ The state acknowledges information concerning Judge's refusal to allow officers to search the house was never presented to the judge who issued the search warrant but fails to recognize the significance of this omission. BOR at 23.

or magistrate at the time the warrant was requested." State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) (emphasis in original). The trial court thus erred in relying on Judge's refusal as a factor supporting probable cause. Id.

The state nevertheless contends Judge's question of "why" is properly taken into account in determining probable cause. BOR at 23-24.

The search warrant affidavit states:

After not receiving an answer at the front door, Officer Brosseau went back to the garage door and looked inside. This time Officer Brosseau said she observed a male subject subsequently identified as Rick Jerome Judge standing in the doorway that's [sic] enters the garage from the residence. *Officer Brosseau instructed Judge to open the garage door so she could talk to him.* Judge replied why.

CP 108-09 (emphasis added).

The trial court concluded "asking 'why' when asked to come out of the garage" supported probable cause. CP 85 (Reasons for Admissibility or Inadmissibility Of The Evidence 4). Penalizing Judge for asking why police officers wanted him to relinquish his constitutional right not to speak with police or leave his home is just as egregious as penalizing Judge for exercising those rights. Judge's question is an expression of lawful resistance to being questioned by the police, and is no more furtive than exercising the right itself. Under the state's logic, the act of

questioning why police want a citizen to give up a constitutional right provides probable cause for police to ignore the right and search and seize at will. Such a rule would vitiate constitutional protections and should be rejected. In State v. Ferrier, the Supreme Court held police violate article I, section 7 in the course of conducting a "knock and talk" procedure if they do not inform a home dweller of his right to refuse consent to a warrantless search of the home. State v. Ferrier, 136 Wn.2d 103, 106, 115, 960 P.2d 927 (1998). Central to this holding was the Court's recognition that any knock and talk procedure is inherently coercive and, faced with this circumstance, the great majority of home dwellers confronted by police on their doorstep would not question the absence of a search warrant in part because they would not know about the warrant requirement. Id. at 115. Judge was one of those rare individuals who did question the police and the trial court impermissibly penalized him for it.

In any event, the question is ambiguous at most. Ambiguous conduct induced by the police does not support probable cause. See Brief of Appellant (BOA) at 23.

- c. The Trial Court Erred In Ruling The Officer's Observation Of Judge's Backyard From the Neighbor's Adjoining Backyard Was Lawful.

The state claims Judge lacks standing to challenge Officer Brosseau's entry onto his neighbor's property. BOR at 26. The state's

point might be relevant if Judge were contesting a search of his neighbor's property, which he is not. Judge contests the search of his own backyard. The state also irrelevantly points out a person does not have a reasonable expectation in areas outside the curtilage of his residence. BOR at 25. Judge challenges the search of his backyard, which is a constitutionally protected area because it is *inside* the curtilage of his residence. State v. Mierz, 72 Wn. App. 783, 791, 866 P.2d 65, 875 P.2d 1228 (1994), aff'd, 127 Wn. 2d 460, 901 P.2d 286 (1995); see also BOA at 26-33.

The state claims Judge does not have standing to contest the search of his own backyard because the open view doctrine applies. BOR at 26-27. The state confuses the distinct concepts of standing and whether a search occurred at all. If the open view doctrine applies, then no search occurs and there is nothing to challenge. State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). If the open view doctrine does not apply, then a search has occurred, and the question becomes whether a person has standing to challenge the search. As set forth in the opening brief, the open view doctrine does not apply and Judge has standing to challenge the search of his own backyard. See BOA at 26-40.

Much of the state's analysis turns on the assumption that police observation of one's property cannot be challenged or does not constitute a search as long as the police are not physically present inside the

boundaries of the suspect's property. That is not the law. The infrared and aerial surveillance cases cited in the opening brief demonstrate the fallacy of this assumption. See BOA at 36-40.

The state claims the issue of whether officers received permission to enter the neighbor's backyard is irrelevant to whether Officer Brosseau was at a lawful vantage point. BOR at 27. Not so. To be lawfully present under the open view doctrine, the police must receive permission from the adjoining property owner before looking into a suspect's property from the adjoining property's vantage point. State v. Bobic, 140 Wn.2d 250, 253, 259, 996 P.2d 610 (2000). The state does not explain why Bobic does not control here.

The state claims substantial evidence showed the fence separating the properties was on the neighbor's side of the property. BOR at 20-21. Pigman testified he did not know the location of the property line and so could not say whose property the fence was on. 2RP 43. In assessing whether substantial evidence exists to support a finding, this Court cannot rely on guesswork, speculation, or conjecture. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

d. Police Officers Conducted An Unlawful Search When They Physically Entered Judge's Backyard Without a Warrant.

The state claims officers were justified in looking into Judge's backyard and actually entering his yard under the exigent circumstance exception to the warrant requirement. BOR at 28-29. The state specifically contends an exigency existed because officers were concerned with "the possible escape of a perpetrator and destruction of evidence." BOR at 29. As set forth in the opening brief, mere possibility of escape or destruction of evidence does not satisfy the exigency exception. BOA at 41-46.

e. Detective Pigman Conducted An Unlawful Search When He Looked Into The Gas Can In Judge's Backyard Without A Warrant.

The state attempts to justify Pigman's inspection of the gas can contents on the ground that officers "feared highly flammable chemicals in the gas cans could cause a fire in the dry brush in August." BOR at 29. Without naming it, the state invokes the emergency exception to the warrant requirement.

Under the right set of circumstances, the emergency exception can justify a search of objects likely to burn, explode or otherwise cause harm. State v. Leffler, __ Wn. App. __, __ P.3d __, 2007 WL 4415064 at 4 (Filed August 21, 2007). The emergency doctrine does not involve officers

investigating a crime, but recognizes the community caretaking function of the police to assist citizens and protect property. State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001); State v. Leupp, 96 Wn. App. 324, 330, 980 P.2d 765 (1999). For the exception to apply, the police intrusion must be totally divorced from any criminal investigation. Schroeder, 109 Wn. App. at 37; State v. Kinzy, 141 Wn.2d 373, 385, 5 P.3d 668 (2000). When the State invokes this exception, the reviewing court must therefore "be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search." Schroeder, 109 Wn. App. at 38. To this end, the state must show (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed. Leffler, 2007 WL 4415064 at 3. Overall, the emergency exception does not apply unless there is "an imminent threat of substantial harm to persons or property." Id. at 1, 4.

The evidence demonstrates no such threat here. In regards to what risks a meth lab presented, Pigman testified, "there is risk of fires, explosions. I've responded to numerous calls while on patrol involving fires later determined that were meth labs, so there is potential for that." 1RP 76. Upon being informed that Brosseau saw someone throwing gas cans off the back deck of the house, Pigman was concerned because "you

don't know what's in those gas cans. If it's highly flammable it could cause a fire." 1RP 79 (emphasis added).

In State v. Lawson, police responded to a call from an anonymous citizen reporting a strong chemical, ammonia-like smell coming from Lawson's residence. State v. Lawson, 135 Wn. App. 430, 432, 144 P.3d 377 (2006). Officers found evidence of methamphetamine manufacture on Lawson's property after receiving consent to search. Id. 432-33. The trial court ruled the absence of a Ferrier warning did not render the search unlawful because the search was justified under the emergency exception, finding police were at Lawson's property to investigate a danger to persons on the property and to the surrounding community, not to gather evidence of illegal drug activity. Id. at 433-34. In testimony remarkably similar to Pigman's, an officer claimed "it was important for her to investigate the smell because '[i]t's a danger to public safety ... [t]here are inhalation hazards [and][s]ometimes meth labs explode.'" Id. at 435. Another officer testified "if you have a lot of houses, one on top of the other and if somebody was producing meth or a byproduct of meth, you're putting a whole bunch of people's lives in danger." Id. This Court reversed because the emergency doctrine did not "authorize warrantless entries where the officers express only a generalized fear that methamphetamine labs and

their ingredients are dangerous to people who might live in the neighborhood." Id. at 438.

Pigman's purported fear is likewise generalized. He testified there was a potential for danger, but a potential danger to the community falls short of the showing needed to justify a warrantless search under the emergency exception. Id. at 437; 1RP 76. Pigman admitted he did not even know what was inside the gas cans, which means he did not know whether flammable material capable of causing a fire or explosion was even present. 1RP 79.

In Leffler, police responded to an anonymous complaint about a chemical smell coming from Leffler's property. Leffler, 2007 WL 4415064 at 1. Upon arrival, Leffler informed police that a travel trailer near the driveway was being used for methamphetamine manufacture. Police called in a clandestine lab team, who searched the property and discovered evidence of methamphetamine. A deputy testified there was no time to get a search warrant because of the dangers methamphetamine labs pose - he had seen "reactions that have actually exploded or tanks that were leaking with ammonia . . . areas had to be evacuated." Id. at 1-2. While circumstances raised valid concerns for officer safety and raised the possibility of toxic gas release, fire, and explosion, this Court rejected the

state's invocation of the emergency exception because there was no evidence that any of these threats were imminent. Id. at 5.

There is likewise no evidence here of an imminent threat that the contents of the gas cans would cause the surrounding area to burst into flames. Pigman did not see any liquid around the gas cans, which indicated their contents were not leaking. 2RP 30. Pigman could not even recall whether the gas cans were capped. 2RP 12, 30, 32.

The emergency exception also does not apply because Pigman's action in looking into the gas can was a pretextual search for incriminating evidence. Pigman retrieved the gas cans from the bushes and "set them on the lawn to get a better look" and proceeded to examine their contents. 2RP 13, 31. He then used that information in support of his search warrant application. Pigman said he was worried that "if" the contents of the gas cans were "highly flammable it could cause a fire." 1RP 79. But gas cans are designed to safely contain flammable materials. The gas cans were not leaking and Pigman could not even recall if the cans were uncapped. Under such circumstances, this Court cannot be satisfied the claimed emergency was anything more than "a pretext for conducting an evidentiary search." Schroeder, 109 Wn. App. at 38.

Because a warrantless search must be strictly circumscribed by the exigencies that justify its initiation, "officers conducting a search under the

emergency exception may not exceed 'the scope of a reasonable search to effectuate the purpose of the entry.'" State v. Gibson, 104 Wn. App. 792, 797, 17 P.3d 635 (2001) (citation omitted). Here, even if Pigman's concern for preventing a fire was subjectively true and objectively justified, his search still exceeded the scope of the claimed emergency. Pigman, instead of looking inside the gas can, could simply have set the gas can upright to prevent its contents from leaking onto the ground. In fact, he did set the gas cans upright, but then proceeded to examine their contents. There was no need under the emergency exception to search inside the gas can to prevent further risk of fire or explosion.

In the absence of exigent circumstances, Pigman's seizure of the gas can and search of its contents was unlawful. See BOA 48-50; see also Posenjak, 127 Wn. App. at 51-53 (although police officer lawfully looked into defendant's garage, officer acted unlawfully in entering garage and seizing incriminating evidence without a warrant).

- f. The Trial Court Erred In Relying On The Presence Of Ice Cubes In Determining Whether Probable Cause Supported The Search Warrant Because That Information Was Not Brought To The Attention Of The Issuing Judge.

The trial court cited the presence of ice in the backyard in support of its probable cause determination. CP 86 (Reasons for Admissibility or Inadmissibility Of The Evidence 8). Pigman's search warrant affidavit

makes no mention of anyone observing ice cubes in the backyard or anywhere else.² CP 108-09. The trial court thus erred in relying on the presence of ice cubes as a factor supporting probable cause. Murray, 110 Wn.2d at 709-10.

g. Untainted Information In The Affidavit Is Insufficient To Show Probable Cause.

The state does not dispute the smell of ammonia, standing alone, is insufficient to constitute probable cause for a search warrant.

h. Whether Probable Cause Supported The Search Warrant Should Be Reviewed De Novo As A Question of Law.

The state asserts the appropriate standard of review in this case is whether the issuing judge abused its discretion in determining probable cause supported issuance of the search warrant. BOR at 18. This Court generally reviews an issuing magistrate's determination of probable cause for abuse of discretion. State v. Johnson, 75 Wn. App. 692, 709, 879 P.2d 984 (1994).

Judge challenges application of the discretionary standard to the situation here, where a considerable amount of tainted information must be excised from the affidavit before determining whether probable cause still supports the warrant. A court abuses its discretion when its decision

² The state's brief neglects to mention this fact.

"is outside the range of acceptable choices, *given the facts* and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997) (emphasis added). The issuing magistrate exercises its discretion to issue a warrant based on the particular set of presumptively valid facts set forth in the affidavit. Once tainted information is excised from the affidavit at the trial or appellate level, there is no way of knowing whether the issuing magistrate would have made the same discretionary decision based on the remaining, untainted information. Under these circumstances, the only sensible approach is to make a de novo determination of whether probable cause exists. See In re Det. of Petersen v. State, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002) (determination of probable cause is question of law reviewed de novo).

Even if abuse of discretion is the correct standard of review here, this Court should keep in mind that "discretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

2. JUDGE'S EXERCISE OF HIS RIGHT TO REFUSE WARRANTLESS ENTRY INTO HIS HOME WAS IMPROPERLY USED AS EVIDENCE OF GUILT AT TRIAL.

The state claims Judge's exercise of his right to refuse warrantless entry into his home was not used as evidence of guilt because the prosecutor did not make an impermissible comment on Judge's refusal to consent. BOR at 33. In arguing Judge's conduct was "absolutely inconsistent with innocent activity," the prosecutor pointed out Judge was "unwilling to cooperate with law enforcement." 5RP 880. The only evidence of uncooperativeness heard by the jury was Judge's refusal to allow officers to search his home. The prosecutor, in her opening statement, explicitly told the jury that Judge refused to allow police into his home and two officers repeatedly testified to that very fact at trial. 5RP 93, 122-23, 336-39. The jury could draw no other inference but that it should hold Judge's lack of consent against him as evidence of guilt. This is not a mere reference to Judge's exercise of his constitutional right. It is an impermissible comment. "[U]se by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective to induce the jury to infer guilt." United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir. 1978) (citation omitted).

The state points to the Supreme Court's observation in State v. Lewis that "[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." State v. Lewis, 130 Wn.2d 700, 706, 927 P.2d 235 (1996). But would most jurors, who represent a cross section of the community, know that a person has the right to refuse consent when officers seek to enter their home? Ferrier held officers must notify a person of the right to refuse warrantless entry into the home because most people do not know the right exists. Ferrier, 136 Wn.2d at 115. Most jurors would not know Judge had the right to refuse consent. Moreover, as pointed out above, the prosecutor here, unlike the prosecutor in Lewis, not only commented on Judge's exercise of the right in closing argument but also explicitly stated in her opening statement that Judge refused to allow officers inside his home. Id.; 5RP 93. And unlike the officer in Lewis, two officers in this case explicitly testified about Judge's refusal to let them into his house. Id. (officer did not say the defendant refused to talk to him); 5RP 122-23, 336-39.

3. THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY JUDGE, IN VIOLATION OF HIS MIRANDA RIGHTS.

The state claims invited error precludes appellate review of the admissibility of Judge's statements because defense counsel stipulated to their admissibility in the second trial. BOR at 35-39. Counsel did not waive his client's constitutional right against self-incrimination. Counsel stipulated Judge's statements would be admissible in the second trial in light of the earlier pre-trial ruling. 5RP 38-39. Counsel did not concede the correctness of that pre-trial ruling. Both parties operated on the assumption that the pre-trial ruling remained in effect because no party sought to relitigate the issue.

Improper admission of evidence in violation of the right against self-incrimination is a constitutional error. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). To be effective, "waiver of a fundamental constitutional right must be 'an intentional relinquishment or abandonment of a known right or privilege.'" State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (citation omitted). Absent an adequate record to the contrary, a reviewing court must indulge every reasonable presumption *against* the validity of an alleged waiver of a constitutional right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed.2d 1461 (1938); State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

The state bears the burden of proving valid waiver. Wicke, 91 Wn.2d at 645. The record, which is at most ambiguous, does not show Judge's counsel intentionally abandoned Judge's right against self-incrimination.

4. THE COURT ERRED IN ORDERING JUDGE TO SUBMIT TO ALCOHOL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

Without citation to supporting authority, the state claims the court correctly imposed evaluation and treatment for "drug/alcohol" as a condition of community custody. BOR at 57. The state's argument rests on the premise that there is no distinction between drug treatment and alcohol treatment when imposed as a condition of community custody. If that were the case, there would have been no need for the court's order to reference alcohol, as the inclusion of the "drug" language would have clearly sufficed to address Judge's involvement with methamphetamine.

The Sentencing Reform Act treats drugs and alcohol differently. RCW 9.94A.700(5)(c) and RCW 9.94A.715(2)(a), which generally address crime-related treatment, have been interpreted to cover alcohol treatment. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003). RCW 9.94A.607(1), on the other hand, addresses under what conditions the court may impose treatment for a chemical dependency. This provision covers drug treatment. State v. Powell, 139 Wn. App. 808, 819-

20, 162 P.3d 1180 (2007). The SRA and case law interpreting the SRA recognize alcohol treatment is not the same thing as drug treatment. This Court should too.

Jones held the court may not order an offender to participate in alcohol treatment or counseling as a condition of community custody unless it finds alcohol use contributed to the crime. Jones, 118 Wn. App. at 208. The state does not dispute alcohol played no role in Judge's crime. Jones controls the outcome in this case.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse Judge's convictions and dismiss all charges with prejudice. In the event this Court declines to dismiss the charges, this Court should remand for a new trial.

DATED this 7th day of January 2008.

Respectfully submitted,

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

COJUN-9 01 2008
STATE OF WASHINGTON
BY: 

STATE OF WASHINGTON)
Respondent,)
vs.)
RICK JUDGE,)
Appellant.)

COA NO. 35357-1-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JANUARY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
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SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JANUARY 2008.

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