

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 36133-7-II
STATE OF WASHINGTON,
Respondent.

vs.

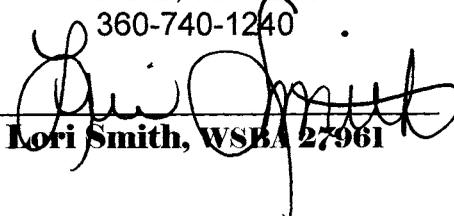
ELWYN D. ARMSTRONG
Appellant.

Lewis County Superior Court Cause No. 05-8-00362-6

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

The statement of the case as set out by the Appellant in his brief is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT'S DENIAL OF ARMSTRONG'S MOTION TO SUPPRESS WAS PROPER.

Robinson claims that the trial court erred in denying his motion to suppress because he claims law enforcement's initial entry onto his rural property was unlawful. This argument is without merit.

A trial court's denial of a motion to suppress is reviewed by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ague-Masters, 138 Wn.App. 86, 97, 156 P.3d 265 (2007), citing State v. Ross, 106 Wn.App. 876, 880, 26 P.3d 298 (2001). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." Ague-Masters, at 97, quoting State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (internal quotation marks omitted, other citations omitted). Conclusions of law are reviewed

de novo, and unchallenged findings become verities on appeal.

Levy, 156 Wn.2d at 733.

Home dwellers have an expectation of privacy in areas contiguous with a home (the "curtilage"), but "police with legitimate business may enter areas of the curtilage which are impliedly open such as access routes to the house, so long as they do so as would a reasonably respectful citizen." State v. Ague-Masters, 138 Wn.App. at 97, 98, quoting State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) (internal quotations omitted). Whether an officer's presence on an individual's property is unconstitutional depends on the totality of the circumstances surrounding the officers' entry. State v. Seagull, 95 Wn.2d at 902. When officers encroach on areas of the curtilage that are impliedly open to the public, they "are free to keep their eyes open" while doing so. Seagull, 95 Wn.2d at 920. In general, "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does *not* constitute a "search" within the meaning of the Fourth Amendment." State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981) (emphasis added).

Moreover, "[u]nder the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment." Ague-Masters, 138 Wn.App. at 98, citing Seagull, 95 Wn.2d at 901. Furthermore, "[w]hether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry." Ague-Masters, 138 Wn.App. at 98, Citing Seagull, 95 Wn.2d at 902-03. Access routes are impliedly open to the public "absent a clear indication that the owner does not expect uninvited visitors." Ague-Masters, 138 Wn.App. at 98, citing Ross, 141 Wn.2d at 312, and State v. Hornback, 73 Wn.App. 738, 743, 871 P.2d 1075 (1994). "No trespassing' signs alone do *not* create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs." Ague-Masters, 138 Wn.App. at 98 (emphasis added), citing State v. Chaussee, 72 Wn.App. 704, 710, 866 P.2d 643 (1994); Furthermore, "[e]ntry during daylight hours is more consistent with that of a reasonably respectful citizen." Ague-Masters, 138 Wn.App. at 98, citing Ross, 141 Wn.2d at 314.

"Entering property to speak with occupants as part of an investigation of a possible crime is legitimate police business." Id.

The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open.

State v. Seagull, 95 Wn.2d at 902. Additionally, when conducting such a "knock and talk" procedure, if officers have not obtained a warrant, the officer may obtain the resident's consent to search the premises if the proper, so-called Ferrier warnings are given. State v. Ferrier 136 Wash.2d 103, 118-119, 960 P.2d 927 (1998)..

Whether consent is voluntary is a question of fact determined from the totality of the circumstances. State v. Apodaca, 67 Wn.App. 736, 739, 839 P.2d 352 (1992), overruled on other grounds by State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995). Threats to obtain a warrant may invalidate consent *if* sufficient grounds to obtain a warrant *do not exist*. Apodaca, 67 Wn.App. at 730-40.

In the present case, Lewis County Sheriff's Deputies went to Armstrong's property on September 8, 2005, at about 5: 30 p.m. RP 41. Here the police were "on legitimate business"

[investigating a crime] when they entered [the defendant's] property because here the police were "entering [Armstrong's] property to speak with occupants as part of an investigation of a possible crime." Ague-Masters, 138 Wn.App. at 98." Armstrong lived off Bergen Road which is a long, dirt road that "kind of goes up a mountain." RP 20. The road is apparently a public road. Id. Furthermore, the road--Bergen Road-- goes to Armstrong's home and this road also has another house on it. RP 21. Armstrong's house was visible from Bergen Road. RP 21. According to Armstrong, his private driveway gives access to two residences, his and his neighbors. RP 38; RP 22. While there were several dogs on the property, including a couple of wolves, the property was not gated. RP 22, 23, 24, 28. Furthermore, the officers went to Armstrong's property during daylight hours (it was on September 8th, 2005, at about 5:30 p.m.) RP 8. Deputies did not stray from the ordinary access road to the home. RP 28. Deputy Engelbertson did not remember seeing any signs. RP 23, 28. Moreover, Deputies were there on legitimate police business to investigate a tip that had come in on the Washington State Patrol tip line that Armstrong had a marijuana grow operation on his property. RP 8, 19, 32. The tip contained specific information

about Robinson's property such as the address, and that there were wolf-like dogs there. RP 8. When police arrived, Armstrong came out of his residence and met the officers in his driveway. RP 11, 24. After getting out of his vehicle in the driveway of Armstrong's home, Deputy Engelbertson could see large marijuana plants growing inside Armstrong's residence. RP 10, 23. All of these facts show that law enforcement here acted as a reasonably respectful private citizen would in approaching Armstrong's property during daylight hours, along the usual, ordinary path to Armstrong's home that anyone would follow. After being lawfully present on Armstrong's property, law enforcement then decided to ask for valid consent to search the premises.

Deputy Engelbertson read Armstrong the full Ferrier warnings. RP 11- 14; State v. Ferrier 136 Wash.2d 103, 118-119, 960 P.2d 927 (1998). Armstrong signed the consent form. RP 14. Armstrong exercised his right to limit how many officers went into his residence and he also eventually stopped the search. RP 14. Inside the residence Armstrong took officers to the marijuana plants and the officers removed 11 plants, a grow light and a ballast. RP 15, 16. Armstrong also handed deputies a sack of marijuana. RP 16. Armstrong then led deputies out to the garden area where the

deputies had already glimpsed some marijuana plants (from their original lawful vantage point). RP 16. More plants were collected before Armstrong ended the consent search. RP 16.

As to Armstrong's claim about that the deputy "threatened" to get a warrant if he did not consent, the record shows that Deputy Engelbertson did *not* "threaten" Armstrong in any way, nor did the deputy state that he would be *granted* a search warrant. Instead, the deputy merely told Armstrong that he would *apply* for a warrant. RP 25. Deputy Engelbertson said: "I will apply for a search warrant." RP 11, 25. "I told him that I would apply for a search warrant if he did not want to sign it which was fine." RP 11, 12; RP 17. I specifically told him I would apply. I always say I will apply for a search warrant because I know I may or may not be granted the search warrant." RP 13. "I didn't threaten him. I did tell him I would apply for a search warrant. . . I don't know if I--a lot of times I do say that [that he may or may not get it] but I can't tell you that I told him that. I don't remember that." RP 17, 18, 26.

These statements by Deputy Engelbretson regarding his ability to *apply* for a search warrant do not constitute improper "threats," nor do the deputy's statements amount to his *wrongly* stating that he would be *granted* a search warrant if Armstrong did

not consent. See, e.g., State v. Apodaca, 67 Wn.App. 736, 839 P.2d 352 (1992) (officer *wrongly* stated that grounds existed for a warrant; thus, resulting consent not voluntary) overruled on other grounds, State v. Mierz, 127 Wn.2d 460, 474-75, 901 P.2d 286 (1995). The circumstances here are different than those in Apodaca because here the deputy did not threaten to arrest Armstrong, and here the deputy had reasonable grounds to believe he would be able to get a warrant because by the time he asked for consent to search the deputy had the anonymous tip together with the open-view sighting from a legal vantage point of Armstrong's marijuana plants (as stated previously, the State maintains that the deputies' initial entry onto Armstrong's property was proper).

1. The Presence of "No Trespassing" Signs on Armstrong's property is Not Dispositive of the Question of Whether the Deputies Were Lawfully Present on the Property.

Armstrong also claims that the presence of "no trespassing" signs on his property was an indicator of the property owner's wish to prevent persons from entering his property-- even along ordinary access routes. However, presence of "no trespassing" signs on property standing alone does not mean that the officers were illegally on Armstrong's property. Rather, "no trespassing" signs

are but one factor to be considered in conjunction with other manifestations of privacy. State v. Gave, 77 Wn.App. 333, 335, 890 P.2d 1088 (1995). Indeed, as the Ague-Masters case shows, the existence of "no trespassing" signs on a parcel of property does not end the analysis as to whether a person can enter a property owner's land along normal access routes which are impliedly open to the general public.. See also., State v. Chaussee, 72 Wn.App. 704, 710, 866 P.2d 643 (1994) (no trespassing signs do not alone create a legitimate expectation of privacy); State v. Johnson, 74 Wn.App. 692, 706, 879 P.2d 984 (1994), review denied, 126 Wn.2d 1004 (1995) (presence of no-trespassing signs is not dispositive of the establishment of privacy but is a factor to be considered).

In the present case, although one of the officers noted a no-trespassing sign, another officer did not recall seeing any such signs, and although there were dogs on Armstrong's property, there was no closed gate or high fences and Armstrong's home shared a driveway with his neighbor. RP 20, 21, 28; See e.g., State v. Chaussee, 72 Wn.App. 704, 710, 866 P.2d 643 (1994) (high fences, closed gates, security devices, or dogs may create an expectation of privacy); State v. Johnson, 75 Wn.App.at 705-706 (signs must be viewed in light of other factors such as the degree to

which the house is isolated or visible from a public road or neighboring property, the use of fences, gates, and the time police enter the property).

One of the deputies in the present case did not recall seeing any signs on the property (RP 23), but did remember that Armstrong's driveway was a shared driveway with a neighboring residence. RP 22, 23. The officers did not notice any gates on the property. RP 28. Furthermore, police here were on legitimate police business when they went to Armstrong's property and they were operating during daylight hours and they traveled on the public road which took them to Armstrong's home and a neighboring home. In short, officers here acted in the way an ordinary, respectful citizen would in approaching a home. RP 7, 8,9, 20,21; State v. Ross, 141 Wn.2d at 313-14. Armstrong came out to meet deputies in the driveway so it did not seem like a particularly "hostile" situation. RP 24. Looking at the totality of the circumstances and the uncertainty over whether there really were any "no trespassing" signs on the property, plus legitimate police business, daylight hours, no high fences or closed gates, and a shared driveway, the deputies' presence on Armstrong's property was lawful and such entry did not violate Armstrong's privacy rights.

The trial court's decision to deny Armstrong's motion to suppress was proper and should be upheld by this Court.

B. ARMSTRONG WAS NOT ENTITLED TO COUNSEL OF HIS CHOICE ON THE EVE OF TRIAL.

Armstrong claims that the trial court erred when it denied his request for "counsel of his choice." Robinson's argument is incorrect.

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. However, "the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, *not* to ensure that a defendant will inexorably be represented by his or her *counsel of choice*. State v. Price, 126 Wn.App. 617, 631, 109 P.3d 27 (2005), citing Wheat v. United States, 485 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Indeed, "[t]he right to retained counsel *of choice* is not a right of the same force as other aspects of the right to counsel; a criminal defendant does *not* have an absolute Sixth Amendment right to choose *any particular advocate*." Id., citing State v. Roth, 75 Wn.App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d

1016, 894 P.2d 565 (1995) (emphasis added); State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) ("A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate."). A court does not need to appoint substitute counsel merely because a defendant claims ineffective assistance. State v. Stark, 48 Wn.App. 245 (1987). Moreover, a motion to continue trial to retain counsel of choice may be denied if it will result in delay of the trial. State v. Chase, 59 Wn.App. 501 (1990). Where an indigent defendant fails to give the court legitimate reasons for new counsel, the defendant may be forced to continue with appointed counsel or to proceed *pro se*. State v. Sinclair, 46 Wn.App. 433, 730 P.2d 742 (1986). "Whether an indigent defendant's dissatisfaction with his court appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court." State v. DeWeese, 117 Wn.2d 369, 375-379, 816 P.2d 1 (1991), citing State v. Sinclair, 46 Wn.App. 433. But, "[t]o limit baseless challenges on appeal, courts have required that a defendant's request to proceed *pro se* be stated unequivocally." State v. DeWeese, 117 Wn.2d at 375-379. However, "[t]he Faretta right to self-representation is *not absolute*, and the defendant's motion to proceed *pro se* must be made in a

timely fashion, or the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge." DeWeese, Id., (emphasis added, citations omitted).

In the present case, Armstrong's first appointed counsel moved to withdraw from the case on February 8, 2007, telling the court that Mr. Armstrong had "fired" him. 2/8/07 RP 1. The trial court refused to appoint substitute counsel but informed Armstrong that he could hire private counsel. 2/8/07 RP 2. On February 15, 2007, Armstrong told the court that he had contacted private counsel but would need to mortgage his home in order to pay the retainer. 2/15/07 RP 1. The court confirmed the case for trial but noted that the trial would probably be "bumped" by another case which would allow at least two days during the following week to work out the details of any substitution of counsel. 2/15/07 RP 2. At the February 15, 2007, hearing Armstrong's counsel told the court that Armstrong had again said that he wanted to represent himself and that he had no objections to Armstrong's doing so. 2/15/07 RP 2. The trial court simply commented that Armstrong "has every right to do that." 2/15/07 RP 2. On February 21, 2007, Armstrong appeared with private counsel. At that time a different judge, who had not heard the 3.6 hearing or any of the other

previous motions to substitute counsel ruled that the case would proceed to trial the next day, and denied the motion for substitution of counsel. 2/22/07 RP 15. The trial court made it clear that had the motion to substitute private counsel been made sooner that he would have granted the motion. 2/22/07 RP 21. Armstrong's court appointed counsel also made a record about the mutual "great difficulty" he and Armstrong were having with one another. 2/22/07 RP 15-17. In denying the motion to substitute counsel the trial court clarified:

I would note that this motion had been made before and that that indicates to me, contrary to what it [sic] indicated to defense counsel, that Mr. Armstrong had plenty of opportunity to retain Mr. Brungardt if that was his intention instead of waiting until the evening or the late afternoon before trial. For those reasons I am going to deny the motion to substitute and the motion to continue.

2/22/07 RP 21. This ruling by the trial court was well within its discretion. Because Armstrong tried to substitute private counsel (or to proceed pro se) on the eve of trial, the trial court was within its discretion to deny the motion to substitute counsel.

1. There Was No Error in the Trial Court's Handling of the issue of Armstrong's Late Request to Proceed *Pro Se*.

Armstrong also claims that the trial court erred when it did not "inquire further" into the defendant's request to represent himself. This argument is without merit as well.

Where an indigent defendant fails to provide the court with legitimate reasons for new counsel, he may be forced to continue with appointed counsel or to proceed *pro se*. State v. Sinclair, 46 Wn.App. 433 (1986); *accord* State v. Staten, 60 Wn.App. at 163. Our courts have acknowledged the "tension" between the right of self-representation and the right to a fair trial in the context of whether a trial court has the affirmative duty to inform a defendant of his right to represent himself. As one Court has phrased it, "unlike the right to assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool." State v. Silva, 107 Wn.App. 605, 621, 27 P.2d 663 (2001), citing State v. Fritz, 21 Wn.App. 354, 359, 585 P.2d 173) (defendant does not have an unqualified right to self representation). When a request to proceed *pro se* is made shortly before trial, the trial court must exercise discretion by balancing

defendant's interest in self-representation and society's interest in the orderly administration of justice. But when a last-minute motion to proceed *pro se* is made for purpose of delay, the court can see it as such and deny continuance. State v. Honton, 85 Wn.App. 415, 422, 932 P.2d 1276 (1997). Because Armstrong's request to proceed *pro se* was late, if not equivocal, it was therefore well within the trial court's discretion to deny Armstrong's half-hearted request to proceed *pro se*.

CONCLUSION

Law Enforcement's initial entry onto Armstrong's property was lawful. Therefore the trial court did not err in denying Armstrong's motion to suppress evidence discovered as a result of that initial entry onto his property. Nor did the trial court err when it refused to grant Armstrong's request for counsel of his choice, or to proceed *pro se*. Accordingly, all of Armstrong's arguments are without merit and his convictions and sentence should be affirmed in all respects.

DATED THIS 10 day of January, 2007.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

BY:


Lori Smith, WSBA 27961

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON

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ELWYN D. ARMSTRONG)
Appellant.)
_____)

NO. 36133-7-II

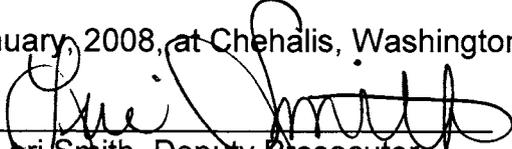
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LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declare under penalty of perjury of the laws of the State of Washington that
the following is true and correct: On the 10th of Jan. 08 I served
appellant with a copy of the Respondent's Brief by depositing same in the
United States Mail, postage pre-paid, to attorney for Appellant at the name
and address indicated below:

Backlund & Mistry
203 East 4th Avenue, Suite 404
Olympia, WA 98501

DATED this 10th day of January, 2008, at Chehalis, Washington.


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Mailing

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)
Appellant.)

No. 36133-7-11
STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Elwyn Armstrong, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

I feel that my 4 Amment Rights - to wit title 18 Chapter 13 SEC 241 and 242 wherein SEC 241 covers ones Rights NOT to Be CONSPIRACED against. 242 covers ones Rights Deprivation of Rights under color of Law. as stated By these chapters and sec the officers had conspired to abridg my Constitution Rights on the morning of Sept 8 2005 with NO regard to my freedoms as gerunted By Both washington state and US Constitution Rights.

Additional Ground 2

my Right to see all Evidence agens me (the tip sheet from the washington state party was NEVER produce) when ask for 2 times in court once By judge and By my self this took place on feb 8 and feb 15 2007 in judge Hall court. MY 5th Amment Right was violated when I was told NO you will answer the Question at my trial, this is covered By ARTICLE 1 section 9 of washington state Constitution also.

If there are additional grounds, a brief summary is attached to this statement.

Date: 8 2 07

Signature: Elwyn Armstrong