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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36338-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

MYRNA DOERING,

Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

By an amended information, the state charged Myrna Doering with 54 crimes. CP 18-32. The charges consist of 49 counts of unlawful possession of a firearm in the second degree, 2 counts of possessing a stolen firearm, 1 count of unlawful possession of a short-barreled shotgun or rifle, 1 count of possession of methamphetamine, and 1 count of possession of less than 40 grams of marijuana. CP 18-32.

Mrs. Doering and her two co-defendants, Harold Doering and Wyatt Doering, filed motions to suppress all charges. CP 39-42, 55. The alleged guns, methamphetamine, and marijuana were discovered during the service of a search warrant at the residence shared by the Doerings. The Doerings challenged the warrant arguing, in essence, that the information obtained by Wahkiakum County Sheriff's Deputy Howell to support the warrant was obtained by an illegal warrantless search of the Doering home. CP 41.

The court, Judge Michael Sullivan, heard the Doerings' motions and granted them by a memorandum decision. CP 55-58. The following Findings of Fact and Conclusions of Law were entered to augment the court's written decision.

FINDINGS OF FACT

1. On the night of Monday, November 21, 2005, Deputy Howell of the Wahkiakum County Sheriff's Office responded to 3504 West SR 4 in Grays River, Washington to assist the Defendant's husband , Harold Doering, with the title to a hulk vehicle he had purchased in Oregon.
2. After examining the hulk vehicle located outside the Defendant's residence and obtaining the required number documentation from the vehicle, Deputy Howell and Harold Doering entered the Defendant's home to complete the hulk vehicle paperwork. To complete the hulk vehicle paperwork, the deputy only needed to sign it.
3. Upon entry into the residence, the deputy took four or five steps into the home with the hulk vehicle paperwork and placed it on top of a nearby speaker to have something to write on.
4. As one enters the front door of the Defendant's residence, the living room area of the home extends to the immediate right and a hallway is visible directly ahead. In the living room, a davenport and love seat abut at a 90-degree angle and extends partially into the center of the living room area.
5. At the time of the deputy's entry into the home, a speaker was located near the entry to the hallway, approximately four or five feet directly ahead of the front door.
6. Beyond the love seat and facing the inward against the outside wall, which houses the front door, is a cabinet with a glass door. The contents of this cabinet cannot be viewed immediately upon entry through the front door, nor can they be seen from the area where the deputy initially placed the hulk vehicle paperwork.
7. After entering the residence and setting the hulk vehicle paperwork down near the front door, Deputy Howell proceeded well into the home and toward the far living room wall past the end of the davenport and began looking

at a mounted elk head with antlers lying on the floor behind the davenport, which was partially visible to the deputy upon entry.

8. While at this location the deputy looked into a glass faced cabinet and saw what he believed to be several "long guns," including hunting rifles and shotguns.
9. At this point, Deputy Howell moved back around the love seat, approached Harold Doering, who was still near the front door, leaned down on the nearby speaker with the hulk vehicle paperwork and wrote on it. The Deputy then handed the paperwork back to Harold Doering and left the residence.
10. Upon the deputy's return to the office, the deputy performed a search of the Defendant's available criminal history and learn that she was a convicted felon. The deputy than applied for a search warrant for the Defendant's residence based upon the Defendant's unlawful possession of firearms.

CONCLUSIONS OF LAW

1. The deputy had permission to enter the residence for the sole purpose of completing the hulk paperwork.
2. The sole reason for the deputy to be in the Defendant's residence was to sign this paperwork. The deputy was not called in response to any 9-1-1 emergency, nor was there any is immediate concern for officer safety once inside the residence.
3. While in Defendant's home the deputy observed what he believed to be several "long" guns," including hunting rifles and shotguns. The deputy did no immediately recognize these items as evidence of contraband.
4. From the initial vantage point where the deputy entered the home and placed the hulk paperwork on a speaker, the contents of the glass cabinet are not plainly visible.

Therefore, the deputy could not view the contents of the cabinet in “plain view”, and the “plain view” exception to the warrant requirement does not apply.

5. The deputy’s movements once inside the home from the area of the speaker to the far side of the room beyond the davenport were not reasonable. The movement of the deputy about the residence after setting down the hulk vehicle paperwork (even if innocent in nature) was totally unnecessary to accomplish the purpose for which the deputy had entered the home, that being to sign hulk vehicle papers.
6. The deputy’s movements and actions after setting down the hulk vehicle paperwork are per se unreasonable as they constituted an unlawful search of Defendant’s residence. Such actions, viewed by an objective standard, were in violation of provisions of the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution, both of which guard against unreasonable searches and seizures.
7. Moreover, the deputy did not have a lawful right to be in the location from which he observed the contents of the glass faced cabinet. Therefore, the deputy was not in a location in which he had a lawful right to be and the “plain view” exception to the warrant requirement does not apply. These actions, viewed by an objective standard, were also in violation of the provisions of the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution, both of which guard against unreasonable searches and seizures.
8. The affidavit in support of the search warrant in this case cannot form the basis for the lawful issuance of a search warrant as the information upon which it was based was not lawfully observed in “plain view,” the result of a lawful search, or some exception to the warrant requirement.
9. All evidence seized by the State of Washington by and through either Deputy Howell’s testimony or the search

warrant issued in this case, and the subsequent interview of the Defendant , is suppressed. As a practical matter, this ruling terminates the case.

CP 59-64.

The state appealed the trial court's decision. CP 67-68. In perfecting the appeal, the state has chosen not to submit a verbatim report of any proceedings.

II. ARGUMENT

A. THE STATE'S FAILURE TO PERFECT THE APPELLATE RECORD PRECLUDES REVIEW.

An appellant bears the burden of perfecting the record so the reviewing court has sufficient relevant evidence before it to assure adequate consideration of the appellant's assignments of error. RAP 9.1, 9.7; *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). If the record is inadequate for review of an assignment of error, the court will not consider it on direct appeal. *State v. Wheaton*, 121 Wn.2d 347, 850 P.2d 507 (1993). In addition, the appellant, when arguing that the trial court erred in entering a finding of fact has a dual burden of (1) perfecting the record sufficient to allow review of this claim, and (2) proving to the court that the record before the trial court did not contain substantial evidence to support the entry of the finding at issue. *State v. Nelson*, 89 Wn. App. 179, 948 P.2d 1314 (1997).

Under the substantial evidence rule, the reviewing court will sustain the trier of fact's findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1998). In making this determination, the reviewing court will not revisit issues of credibility which lie with the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

By contrast, an appellant need not assign error to a specific conclusion of law by number in order to preserve the issue on appeal because this argument presents an issue of law that the appellate court reviews de novo. *State v. Dempsey*, 88 Wn. App. 918, 947 P.2d 265 (1997). However, when a conclusion of law contains an assertion of fact, it functions as a finding of fact and is reviewed under the substantial evidence rule. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

In our case, the state failed to assign error to any of the trial court's findings of fact. As a result, they are verities on appeal. Instead, the state assigned error to conclusions of law 1, 4, 5, 6, 7, 8, and 9. See Brief of Appellant, pages 1-2. These findings state:

1. The deputy had permission to enter the residence for the sole purpose of completing the hulk paperwork.

...

4. From the initial vantage point where the deputy entered the home and placed the hulk paperwork on a speaker, the contents of the glass cabinet are not plainly visible. Therefore, the deputy could not view the contents of the cabinet in "plain view", and the "plain view" exception to the warrant requirement does not apply.

5. The deputy's movements once inside the home from the area of the speaker to the far side of the room beyond the davenport were not reasonable. The movement of the deputy about the residence after setting down the hulk vehicle paperwork (even if innocent in nature) was totally unnecessary to accomplish the purpose for which the deputy had entered the home, that being to sign hulk vehicle papers.

6. The deputy's movements and actions after setting down the hulk vehicle paperwork are per se unreasonable as they constituted an unlawful search of Defendant's residence. Such actions, viewed by an objective standard, were in violation of provisions of the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution, both of which guard against unreasonable searches and seizures.

7. Moreover, the deputy did not have a lawful right to be in the location from which he observed the contents of the glass faced cabinet. Therefore, the deputy was not in a location in which he had a lawful right to be and the "plain view" exception to the warrant requirement does not apply. These actions, viewed by an objective standard, were also in violation of the provisions of the Fourth Amendment to the United States Constitution and Article 1 Section 7 of the Washington Constitution, both of which guard against unreasonable searches and seizures.

8. The affidavit in support of the search warrant in this case cannot form the basis for the lawful issuance of a search warrant as the information upon which it was based was not lawfully observed in “plain view,” the result of a lawful search, or some exception to the warrant requirement.
9. All evidence seized by the State of Washington by and through either Deputy Howell’s testimony or the search warrant issued in this case, and the subsequent interview of the Defendant, is suppressed. As a practical matter, this ruling terminates the case.

These conclusions of law contain a number of findings of fact including the following: (1) that the deputy only had permission to enter the house to sign the hulk vehicle paperwork; (2) that the deputy could not see the firearms from his vantage point where he was to sign the paperwork; and (3) that the deputy’s action of setting the paperwork down and walking back into the house had nothing to do with signing the paperwork.. Each of these facts required the court to hear testimony about what happened and what was said, and required the court to reevaluate the credibility of the witnesses to the extent that the testimony conflicted. As a result, although contained in the section entitled “Conclusions of Law,” they are nonetheless findings of fact and are subject to the substantial evidence rule.

In order to provide effective appellate review of these findings, the state has the duty of arranging for the transcription of the testimony from the contested hearing. The state then has the further duty to demonstration

to this court how no "fair-minded, rational person" could have entered these findings based upon the testimony presented. In this case, the state can meet neither of these burdens because a verbatim report of the testimony presented and any other evidence the trial court considered has not been made part of the record on appeal. Thus, to the extent the conclusions of law in the case contain findings of fact, they are also verities on appeal because the state has failed to perfect a record sufficient to allow for review under the substantial evidence rule.

B. THE FINDINGS OF FACT SUPPORT THE TRIAL COURT'S CONCLUSIONS OF LAW AND ORDER SUPPRESSING EVIDENCE.

Under Article 1, Section 7 of the Washington Constitution, as well as under the Fourth Amendment to the United States Constitution, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless search unless the state meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

Here, Mrs. Doering and her co-defendants brought a motion to suppress evidence that a deputy seized in reliance upon a search warrant

issued solely on information the deputy obtained following his warrantless entry into Mrs. Doering's home. Since the deputy's affirmation given in support of the warrant included his statement that he made a warrantless entry into the Mrs. Doering home, Mrs. Doering met her burden of production to prove a warrantless search. At that point, the burden fell upon the state to prove one of the "jealously and carefully drawn" exceptions to the warrant requirement. The state attempted to do this by arguing consent and plain view. Specifically, the state argued that (1) the deputy had consent to enter at least to the point where he signed the paperwork, and at the point he could see the firearms, and (2) to the extent that deputy had to walk further into the home to see the firearms, his movements were also with consent. The following address these arguments.

Warrantless searches, such as the one in this case, may be constitutional if preceded by a valid consent. *Washington v. Chrisman*, 455 U.S. 1, 9-10, 70 L.Ed.2d 778, 102 S. Ct. 812 (1982). In order for the consent to be valid, it must be voluntary. *State v. Shoemaker*, 85 Wn.2d 207, 533 P.2d 123 (1975). In addition, an entry and search made upon consent may be limited or withdrawn at any time. *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976). A consensual search may also be limited to the area covered by the defendant's consent; consequently,

any search exceeding the scope of the consent is invalid. *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1302 (1974). Whether consent was voluntarily given is a question of fact to be determined from the “totality of circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 229, 36 L.Ed.2d 854, 862-63, 93 S. Ct. 2041, 2047-48 (1973). The burden is on the state to prove by “clear and positive evidence” that consent was voluntarily obtained and that its scope was not exceeded. *Shoemaker*, 85 Wn.2d at 210; *State v. Rodriguez*, 20 Wn. App. 876, 582 P.2d 904 (1978).

The plain view doctrine is another exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. *State v. Myers*, 117 Wn.2d 332, 815 P.2d 761 (1991). Under this exception, if the police had prior justification for the intrusion and if they saw an item sitting in plain view, then the seizure or viewing of the item does not offend the privacy interests protected in Washington Constitution Article, Section 7 and United State Constitution, Fourth Amendment. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *State v. Lair*, 95 Wn.2d 706, 630 P.2d 427 (1981). The key to the exception is that the officer must have had a legal right to be where he was when the item in plain view was seen. *Id.*

As the court clarified in *Schneckloth v. Bustamonte*, the decision of whether consent had been given, as well as what the scope of the consent was, and what actions exceeded the scope of that consent, are questions of fact to be decided by the trial court. As such, they can only be overturned on appeal if the state proves that the substantial evidence does not support them. In our case, the trial court found the (1) the deputy's consent to enter the Doering home was limited to signing a piece of paper; (2) that the officer could not see the firearms from the area where he had permission to be, and (3) when the officer left that area and went farther into the house where he could see the firearms he was exceeding the scope of the permission to enter.

These findings are verities on appeal based on the state's failure to perfect the record sufficiently to allow for their review. They are legally sufficient to support the trial court's conclusion of law that the deputy violated Mrs. Doering's right to privacy under Washington Constitution Article 1, Section 7 and United State Constitution, Fourth Amendment, when he put down the paperwork and wandered further into the house. At that point, he exceeded the scope of his consent to enter, thereby vitiating any claim that the firearms were in plain view. As a result, the state's argument that the deputy had permission to enter further into the house fails.

In addition, the state's argument that the trial court erred when it found that the deputy could not see any firearms from the location where he was permitted to be – the area in which he signed the paperwork – must also fail. This decision about what the deputy could or could not see from any given position in the house is entirely factual. Thus, the state's failure to perfect the record sufficiently to allow this court to determine whether or not substantial evidence supports it precludes review of this claim. Consequently, the trial court's factual decision that the officer could not see the firearms from the area in which he was licensed to be stands as a verity on appeal and the state's argument on this point also fails.

In this case the state failed to prove any applicable exception to the warrant requirement. As a result, the trial court did not err when it granted Mrs. Doering's motion to suppress all of the evidence seized as a result of the warrant issued in reliance on information the deputy illegally obtained by violating Mrs. Doering's right to privacy. The appeal should be denied.

III. CONCLUSION

The trial court properly granted Mrs. Doering's motion to suppress evidence. The dismissal of charges in this case should be affirmed.

Respectfully submitted this 4th day of January, 2008.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

LISA E. TABBUT/WSBA #21344
Attorney for Respondent

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Cmm
DEPUTY

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

STATE OF WASHINGTON,)	No. 36338-1-II
)	
Appellant)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
MYRNA DOERING)	
)	
Respondent.)	

LISA E. TABBUT, being sworn on oath, states that on the 4th ay of January 2008, fiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Daniel Herbert Bigelow
Wahkiakum County Prosecuting Attorney
P.O. Box 608
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And

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

And

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT

ATTORNEY AT LAW

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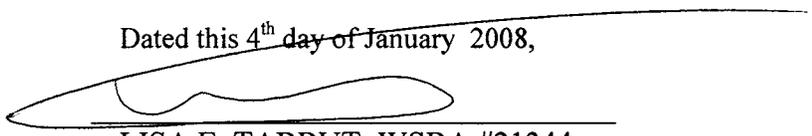
And

Myrna Doering
3404 West SR 4
Grays River, WA 98621

and that said envelope contained the following:

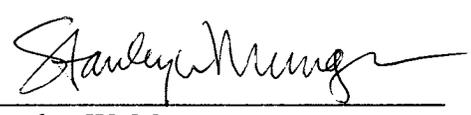
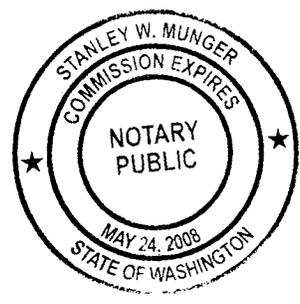
- (1) BRIEF OF RESPONDENT
- (2) AFFIDAVIT OF MAILING

Dated this 4th day of January 2008,



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 4th day of January 2008.



Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08