

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

NO. ~~36539-3-II~~ Consolidated
36359-3-II

FILED
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COURT OF APPEALS
DIVISION II
SEATTLE, WA


STATE OF WASHINGTON
Appellant,

vs.

ASHLEY B. PARKER
Respondent

STATE OF WASHINGTON
Appellant,

vs.

STEPHANIE ALVAREZ
Respondent

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 06-8-00063-4
06-8-00065-1

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENTS OF ERROR

1. The trial court erred in finding the resident of 5111 Hendricks Street and his invitees had a reasonable expectation of privacy in the area located within the enclosure.
2. The trial court erred in finding a “reasonably respectful citizen” would not pass through the gate to access the residence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the homeowner and his invitees have a reasonable expectation of privacy between the wall and the house? Assignment of Error No. 1.
2. Would a “reasonably respectful citizen” have entered the gate to talk to the occupants? Assignment of Error No. 2.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On October 20, 2006, charges were filed separately against Ms. Parker and Ms. Alvarez for being minors in possession of alcohol in Jefferson County Superior Court. Joinder of the two cases was ordered by the court.

Defense submitted CrR 3.6 motions to suppress on November 27, 2006. A hearing on the Motion to Suppress was held January 11, 2007, before Judge Pro Tem James Bendell. In a Memorandum Opinion signed by Judge Pro Tem Bendell on January 19, 2007, the Motion to Suppress was granted.

The State filed a Motion for Reconsideration with the Jefferson County Superior Court on January 24, 2007. Judge Pro Tem Bendell denied this motion in a Memorandum Opinion dated February 28, 2007.

Findings of Fact and Conclusions of Law were filed on May 24, 2007. Judge Pro Tem Bendell signed an Order of Dismissal with Prejudice on May 24, 2007.

The State filed a notice of Appeal on May 25, 2007.

FACTS

On September 29, 2006, at about 11:00 p.m. Port Townsend Police Officer Erickson was on patrol. She had a civilian ride-along in her car. A few days previously, Officer Surber had briefed other police officers that there was a high school rumor of a weekend drinking party at “the salmon-colored house on 49th.” RP 89-90. The officer knew of the house. RP 46. Officer Erickson’s civilian ride along told her the under age drinking party was occurring and wished to remain anonymous. Office Ericson drove to the location and from her car heard music and laughing coming from the rumored party location. RP 49.

Officer Ericson then radioed for assistance and met Officer Huynh at the nearby fairgrounds. Both officers returned to the scene and looked for the driveway or entrance to the house. They drove up and back on the nearest adjacent road but were unable to correlate any driveway with the house. The attempt was unsuccessful because they did not have a house address and the driveways were not marked. RP 113-115. As can be seen on the aerial photograph, the house is located at the rear of the property, very close to 49th Street and adjacent to a neighbor’s driveway

opening onto 49th Street, while the actual driveway off of Hendricks Street passes close by another neighbor's house that screens the subject house from Hendricks Street. State's EX 6A. The police then parked their cars on 49th and walked up a short driveway to reach a gate in the fence around the suspect house. RP 52. The gate was only a few yards from 49th. RP 56-57. It was unclear to the officers whether this was the public entrance to the house or not, so they called out "Police" loudly three times but got no response. RP 55. While standing at that gate, they smelled the odor of burning marijuana and could hear laughing and loud music. RP 56. Getting no response, the police walked around the north side of the house on a path looking for the main entrance. They came to another gate with a latch on the outside. The gate is made of wood, has several large openings at the top, and does not form a weather tight seal with the wall. State's EX 11. Believing this was not the entrance to the house, RP 64, the officers opened the gate and walked toward the front door. The area within the wall was a patio with tables and chairs and was occupied by some youths who fled at their "Police Officer" announcement. RP 64.

In their search for the entrance the Police Officers did not see any windows, signs giving directions or stating “No Trespassing”. RP 70.

Mr. Lebens, the homeowner, testified that construction of the house started in 1994 and the adobe-style wall surrounding the house was some nine years later. RP 28-31. Mr. Lebens also testified that he often left a delivery service signature card tacked to the front gate so that delivery persons could leave packages outside the gate. When asked why he posted the card on the gate, he replied, “...most people would not feel comfortable because you’re in the house.” RP 37. Mr. Lebens testified that he does not receive any newspaper delivery, the mail is delivered outside the wall, he has never had trick-or-treaters visit, only one person, “Ross”, known to him, leaves religious literature on the chair outside his gate, there is no way to approach the house except through one of three gates or the garage, and that he has never locked the gates. RP 40-41.

ARGUMENT

The trial court erred in finding the resident of 5111 Hendricks Street and his invitees had a reasonable expectation of privacy in the area located within the enclosure.

Standard of review. We review findings of fact on a motion to suppress under the substantial evidence standard. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644, 870 P.2d 313. “[W]here the findings are unchallenged, they are verities on appeal.” *State v. O’Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003) (citing *Hill*, 123 Wash.2d at 644, 870 P.2d 313). We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996), *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

As a prerequisite to asserting an unconstitutional invasion of rights, a person must demonstrate that he had a legitimate expectation of privacy in the area or item searched. *State v. Goucher*, 124 Wash.2d 778, 787, 881 P.2d 210 (1994). The courts view a person's home as the area most strongly protected by the constitution. *State v. Ross*, 141 Wash.2d at 312, 4 P.3d 130. Although residents maintain an expectation of privacy in the curtilage, or area contiguous with a home, “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. Seagull*, 95 Wash.2d 898, 902, 632 P.2d 44 (1981) (footnote omitted).

Here the police intent was to use the public access route to the house to talk to the homeowner. They had an unusually difficult time locating that route to Mr. Lebens’ house due to darkness; lack of a house address; identification in the rumor and by the citizen ride-along that the house was on 49th Street; and the house’s unusual construction.

When the officers located the front gate, it was not locked; they saw no directional, “Private Property,” or “No Trespassing” signs. The gate had none of the normal aspects of a home’s front door, such as being weather tight or having a lockable doorknob. All of the evidence available to the police was that they were on the sole public access route to the house. The police saw no indication the homeowner intended the gate to be the entrance to the house itself. Even after the police opened the gate, they believed it to be separate from the house because they could see the front door of the house ahead of them.

In a drug case, the Court of Appeals reversed the Defendant's conviction finding that the deputies' initial intrusions onto his property exceeded the scope of an implied invitation. *State v. Ross*, 91 Wn.App. 814, 819-20, 959 P.2d 1188 (1998). The court relied on the following facts: (1) the discovery was not accidental because the deputies entered Defendant's property specifically to investigate an alleged marijuana grow operation; (2) the deputies acted secretly by going on the property at night, in plain clothes, in an unmarked car, and did not identify themselves; and (3) the deputies used a side-entry rather than the most direct access route to the front door. *Ross*, 91 Wn.App. at 820, 959 P.2d 1188. This case is distinguishable because here the police were in full uniform, drove marked police cars, identified themselves at every opportunity, used the most direct access to the front door, once identified, and went directly to the house.

As in *Seagull*, the police were not secretive; rather they "acted openly in an honest attempt to talk with the occupants of the house." *State v. Seagull*, 95 Wash.2d 898, 902, 632 P.2d 44 (1981)

The trial court erred in finding a “reasonably respectful citizen” would not pass through the gate to access the residence.

Courts have recognized a legitimate expectation of privacy in the curtilage, which is that area “so intimately tied to the home itself that it should be placed under the home's ‘umbrella’ of Fourth Amendment protection.” *State v. Ridgway*, 57 Wn.App. at 918, 790 P.2d 1263 (1990) (quoting *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 1140, 94 L.Ed.2d 326 (1987)). Curtilage questions are resolved with reference to four factors: (1) the proximity of the area claimed as curtilage to the home; (2) whether the area is included in an enclosure surrounding the house; (3) the nature of the uses to which the area is put; (4) the steps taken by the resident to protect the area from passersby. *State v. Niedergang*, 43 Wn.App. 656, 660, 719 P.2d 576 (1986). Here the first three factors are met but the resident did not take any steps to inform visitors that the area within the gate was considered part of the home. In fact, the homeowner testified that for his only regular uninvited visitors, delivery persons, he had taken to leaving a signature card tacked to the gate and a chair outside the gate where deliveries could be left. Why did he do this? Because, he

testified, the delivery persons were “uncomfortable” once they had entered the gate and discovered it was being used as part of the residence. This could only occur if the delivery persons, whose occupation requires them to be “reasonably respectful citizens,” had, in fact, believed the gate to be part of the public access route to the house and entered it.

When a defendant did “everything that one could imagine to warn others that they did not want uninvited visitors on their land,” by placing multiple “No Trespassing” and “Private Property” signs and fencing their land, the court held that they had manifested their desire to exclude uninvited visitors from their property. *State v. Johnson*, 75 Wn.App. 692, 879 P.2d 984 (1994). Here, the police had no way to tell that the resident intended the public access route to end at the gate. Only when the homeowner manifests his intentions can the public or the police observe them. The police used the same public access route that other “reasonably respectful citizens” previously used to access the house. The police did not violate the homeowner’s reasonable expectations of privacy.

The evidence was lawfully obtained and should not be excluded.

CONCLUSION

The State respectfully requests that this Court reverse the trial court's suppression of the evidence obtained by police and respondent be required to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

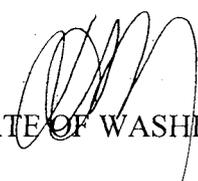
Respectfully submitted this 28TH day of September, 2007

JUELANNE DALZELL, Jefferson County
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A handwritten signature in cursive script, appearing to read "Thomas A. Brotherton", is written over a horizontal line.

By: THOMAS A. BROTHERTON , WSBA #37624
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07/11/07 10:12:00

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DIVISION II

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Case No.: 36539-3-II
CONSOLIDATED

Superior Court No.: 06-8-00063-4
06-8-00065-1

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 13th day of November, 2007, I mailed, postage prepaid, a copy of the State's

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1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing declaration is true and correct.

3 Dated this 13th day of November, 2007, at Port Townsend, Washington.
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27 DECLARATION OF MAILING
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