

NO. 36470-1-II

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

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MELISSA R. DANIELSON,

Appellant.

REPLY BRIEF OF APPELLANT

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pm 4-16-08

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I. ARGUMENT AND AUTHORITIES

A. The command to search contained in the search warrant authorized a search of the mobile home but not the outbuilding, which was a separate structure with a separate entrance, and all evidence seized and/or derived from the search of the outbuilding should have been suppressed.

1. Although the trial court did not enter formal findings of fact, to the extent that the court's memorandum opinion could be construed as containing a finding of fact that the outbuilding (storage unit) was not separate and distinct from the mobile home, appellant excepts, as the record clearly demonstrates to the contrary.

All witnesses agreed that there was no entrance into the outbuilding from inside the mobile home. RP 25, 69. The entrance to the outbuilding (storage unit) was approximately 12 to 15 feet *away* from the back door of the mobile home. RP 69. The outbuilding had a separate roof from the mobile home. RP 83. The outbuilding did not share any walls in common with the mobile home. RP 84; trial exhibit 36 (copy attached). The outbuilding had a separate foundation. RP 84.

Whether an outbuilding is five inches or fifty feet away from the structure identified in the command to search, it is still an outbuilding and our jurisprudence requires that it be treated as such. As exhibit 36 clearly shows, the outbuilding in this case was/is a separate and distinct structure, and if the

court were to adopt the State's argument it would dilute the particularity/specificity requirements that constitute a foundation of our Fourth Amendment and Article 1, § 7 protections. If the command to search is not required to include an outbuilding five inches away from the main residence today, then the State will be arguing that it need not be required if it is fifteen feet away tomorrow. It is in this manner that constitutional protections are gradually eroded to the point that they cease to exist.

2. The State's reliance upon *U.S. v. Heldt* is misplaced.

The State's brief relies upon *U.S. v. Heldt*, 215 U.S. App. D.C. 206, 668 F.2d 1238 (1981), as authority to support its argument that the command to search the mobile home in this case should extend to the outbuilding behind the mobile home. *Heldt*, however, is easily distinguished.

In *Heldt*, the FBI obtained a warrant to search "the suite of offices of Mr. Henning Heldt" belonging to the Church of Scientology on the sixth floor of a location called the Fifield Manor in Hollywood, California. The issue before the court was whether or not a free-standing penthouse room located on the roof extending outside Mr. Heldt's office on the sixth floor could reasonably have been viewed by the searching agents as constituting

part of “the suite of offices of Mr. Henning Heldt.” The court upheld the search of the penthouse (also described as “the hut”) because it would have reasonably appeared to officers executing the warrant that it was part of the “suite.” Referring to Webster’s Third New International Dictionary’s definition of “suite” as constituting “a series or group of things forming a unit or constituting a compliment or collection: SET: as a (1): A group of rooms designed for occupancy as a unit,” the court naturally concluded that it was logical to assume, since the nearest entrance to the hut was through the office of Henning Heldt, and that the only restroom available for use by someone in the hut was in Heldt’s office, and that the “group of rooms” were all on the same floor (and contained in the same building) that officers executing the warrant would reasonably assume that the “suite of offices of Mr. Henning Heldt” included the penthouse.

Obviously, the facts are far different in the case at bench, principally because Heldt was unusual in that the command to search directed officers to a suite of offices on the same floor of the same building. The warrant in the case at bench, on the other hand, did not authorize a search of a suite of buildings but instead specifically authorized a search limited to the mobile home located at 5910 NE 131st Avenue, without any expansive language such

as “and the adjacent shed, the curtilage, outbuildings, appurtenances, or the premises” which could have reasonably conferred additional authority to search beyond the mobile home. While the command to search interpreted by the court in *Heldt* allowed officers executing the warrant room for interpretation, the command to search in the case at bench does not. While the Webster’s definition of “suite” refers to a series or group of things forming a unit or constituting a compliment or collection, the Webster’s definition of mobile home is specifically and discreetly limited to the home itself, not other structures that may be located on the property, regardless of proximity to the mobile home. Thus, the search in *Heldt* was arguably authorized by the command of the warrant, while the search of the outbuilding in the case at bench clearly was not.

3. The State’s reliance upon *U.S. v. Principi* is also misplaced.

U.S. v. Principi, 499 F.2d 1135 (1974), is similar actually to *State v. Llamas-Villa*, 67 Wn.App. 448, 836 P.2d 239 (1992), analyzed in the brief of appellant, at 13-15. In *Llamas-Villa*, the issue was whether the contemporaneous search of a locker accessed through a door marked “storage” immediately next to the door of an apartment exceeded the scope

of the command to search the apartment. In *Principi* the issue was whether the command to search an apartment extended to a cabinet three to six feet away from the apartment door in the same building. Thus, both cases involved the search of a storage area appurtenant to or in close proximity to the front door of an apartment *in the same building*. Neither case involved the search of an *outbuilding* on real property where the command to search was restricted to a mobile home. Significantly, the only authority cited by the State in its brief are cases involving a command to search an apartment or offices *in a building*, as no authority exists to justify a search of an *outbuilding*, as in this case. See *Llamas-Villa*, at 452-53 (“unlike the barn and garage in *Kelley*, neither the locker nor the storage room comprised a separate building.”) As a result, because this case involves “a separate building,” unlike a storage area in the *same building*, as in *Principi* and *Llamas-Villa*, the case at bench is controlled by *State v. Kelley*, 52 Wn.App. 581, 762 P.2d 20 (1988), especially in the absence of any expansive language contained in the command to search. See *State v. Cottrell*, 12 Wn.App. 640, 644, 532 P.2d 644 (1975) (in virtually all cases where the courts had permitted searches beyond the specific language contained in the command

to search, the language of the warrant “included such addenda as ‘and curtilege’ or ‘and appurtenances.’”)

4. In the absence of any language expanding the scope of the search beyond the mobile home, such as “curtilege,” “outbuildings,” “appurtenances,” or “premises,” the search of the outbuilding was without authority of law and in violation of art. 1, § 7.

a. State grounds analysis.

When violations of both the federal and Washington Constitutions are alleged, the state constitutional claim is examined first. *State v. Young*, 123 Wn.2d 173, 178, 867 P.2d 593 (1994); *State v. Johnson*, 75 Wn.App. 692, 698, 879 P.2d 984 (1994). Whether the Washington Constitution provides a level of protection different and/or greater from that afforded by the federal constitution in a given case is ordinarily determined by reference to the six non-exclusive factors identified in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R. 4th 517 (1986). In *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990), the supreme court adopted *Gunwall*'s analysis of factors 1, 2, 3, and 5. As a result, the critical factors requiring examination are (4) pre-existing state law and (6) matters of particular state or local concern. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

With the foregoing in mind, Washington has historically protected private property interests from trespassory invasion. Even before achieving statehood, Washington enacted laws allowing individuals to exclude others from their property. See, e.g., Laws of 1869, § 64, p. 212; Laws of 1873, § 67, p. 195. Trespass is still regarded as a crime today if someone “knowingly enters or remains unlawfully in or upon premises of another . . .”, RCW 9A.52.080 (1), and it is a gross misdemeanor “for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.” RCW 10.79.040. In addition, the Washington State Supreme Court has held art. 1, § 7 provides greater protection than that afforded by the Fourth Amendment in cases involving a warrantless intrusion into a student’s dormitory room, *State v. Chrisman*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984), and into a private residence during the course of a knock and talk. *State v. Ferrier, supra*. And, finally, the Washington Court of Appeals has held greater protection is afforded under art. 1, § 7 in analyzing cases involving the open fields doctrine. *State v. Johnson, supra*.

With regard to whether the matter is of particular state or local concern, the degree of privacy a citizen of this state has in his or her home is

primarily a local concern, and there is no need for national uniformity on this issue. *State v. Ferrier, supra* at 112; *State v. Young, supra* at 180-81.

b. Because the command to search in this case did not contain authority to search the premises beyond the mobile home itself, the search of the outbuilding was without authority of law and in violation of art. 1, § 7.

Having established that trespass without a warrant invokes the broader protection of art. 1, § 7, the next issue is whether the command to search contained in the warrant in this case conferred “authority of law” to search the outbuilding.

Preliminarily, even “the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant.” *Givens v. Six Unknown Named Agents*, 403 U.S. 388, 403, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). *Accord, State v. Cottrell, supra*, at 643: “As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant.” As a result, given the broader protection provided by art. 1, § 7, it seems apparent that searches beyond the command to search contained in the warrant would be subject to the strictest scrutiny under art. 1, § 7, especially in cases involving the search of a home,

which has historically been accorded heightened constitutional protection under our jurisprudence. *State v. Young, supra* at 185.¹

Where, as may be true in some cases, but not in the case at bench, the command to search contains language authorizing a search not only of the mobile home itself, but also related appurtenances, structures, outbuildings, or the premises, a search may be reasonably upheld provided probable cause exists to search in those areas. But where, as in the case at bench, the command to search contains no language conferring additional authority upon officers executing the warrant to search beyond the mobile home itself, search of other structures on the property are “without authority of law,” and in violation of art. 1, § 7.

B. The oral amendment of charges during trial violated the defendant’s constitutional right to notice.

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Because “the closer officers come to intrusion into a dwelling, the greater the constitutional protection,” *id.* at 185, it is clear that any structures within the curtilage are entitled to the same level of protection as the home itself, and there is no question that an outbuilding only a few inches away from the residence must qualify under this criteria.

1. Although the State moved to amend the enhancement during its case in chief, the defendant was not provided constitutionally sufficient notice of the substantive elements of the new charge.

Under the state and federal constitution, the accused has a protected right to be informed of the criminal charge against herself in order to adequately prepare and mount a defense at trial. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Although courts avoid technical defects, the jurisprudence on the notice provision has been tailored towards the precise evil that Article 1, § 22 is designed to prevent - - charging documents that prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice. *State v. Schaffer*, 120 Wn.2d 616, 620, 845 P.2d 281 (1993), *reconsideration denied*.

As previously conceded, the State orally moved to amend the information during its case in chief, prior to calling Caroline Dorey, the Evergreen School District Transportation Officer. RP 321. However, neither the State nor the court advised the defendant of the elements of the amendment at that time. Even after the State rested its case and the court heard argument on the motion to amend, the defendant was never advised of the elements of the newly charged enhancement. RP 352-56. Therefore, the

defendant was not placed on notice of the charges against her during the State's case in chief, if at all.

Correspondingly, this case should be treated as an amendment made after the State rested its case in chief, or arguably after trial since the amended information was not filed until three days later. CP 68. Post-trial amendments are reversible error per se even without a showing of prejudice. *State v. Laramie*, 141 Wn.App. 332, 343, 169 P.3d 859 (2007).

Alternatively, amendments made after the State has rested its case in chief are also per se error, unless the amendment is to a lesser degree of the same charge or a lesser-included offense. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). The amendment in this case affected substantive elements of the enhancement and cannot be considered a lesser degree of the same charge or a lesser-included offense. The fact that the penalties are the same for both enhancements is irrelevant, otherwise the State would be allowed to amend the information adding different charges so long as the penalties were the same, such as exchanging one class A felony for another. The substantive elements are at the heart of the notice provision, providing the defendant with a constitutional right to adequately prepare in his or her defense. The courts have consistently focused on substantive elements as well. For example, the courts allow amendments where the principal element

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in the new charge is inherent in the previous charge, and no other prejudice is demonstrated. *State v. Johnson*, 7 Wn.App. 527, 500 P.2d 788, adopted 82 Wn.2d 156, 508 P.2d 1028 (1973). Put another way, if the principal element in the new charge is not part of the previous charge, such as a lesser degree or lesser-included offense, the defendant does not have constitutionally sufficient notice.

The enhancements at issue here is the originally charged school zone enhancements and a bus stop enhancement, as amended. The former requires proof that the alleged activity occurred within 1,000 feet of the perimeter of the school grounds; the latter requires proof that the alleged activity occurred within 1,000 feet of a school bus route stop. RCW 69.50.435(1)(d); RCW 69.50.435(1)(c). Clearly the object or boundary in question is the principal element of these two enhancements. Either the State alleges the activity occurred near the perimeter of a school grounds, or a school bus route stop. A school bus route stop is not inherent in the elements of the previously charged school grounds enhancement. Therefore, the defendant's constitutional right to be informed of the charges against her was violated when the trial court allowed the State's amendment of charges.

2. Assuming the amendment did occur during the State's case in chief, the late notice was prejudicial.

Where a jury is involved and the amendment occurs late in the State's case, impermissible prejudice could be more likely. *State v. Schaffer*, 120 Wn.2d at 621; *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). Prejudice can also result where the amendment may have changed the defendant's trial strategy or plea negotiations. *State v. Zeigler*, 138 Wn.App. 804, 158 P.2d 647 (2007). In *State v. Ziegler*, 138 Wn.App. 804, 158 P.3d 647 (2007), the court held the addition of two charges affected the defendant's ability to prepare his defense because trial strategy and plea negotiations with the state would likely have been different had he known there would be two additional charges. The amendment violated the defendant's right to notice. *Id.* at 811.

Similarly, the case at bench, the defendant's trial strategy and plea negotiations would have certainly been different had they known the State would be alleging a school bus stop enhancement. Prior to trial, the defendant only had notice that the State was alleging a school zone enhancement, which all parties agreed that there was insufficient proof of at the time of trial. RP 321. It is reasonable to believe that the defense knew the State would not be able to prove the elements of the school zone

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enhancement, which is a legitimate strategy and likely affected plea negotiations with the State.

The fact that the defendant did not request a continuance is merely persuasive. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). Any failure to do so could only be contributed to ineffective assistance of counsel, not lack of surprise or prejudice to the defendant. Where the law allows the defendant to request a continuance when misled or surprised by an amendment of the information, the defendant did not have notice of the substantive elements of the amendment, and defense counsel conceded they could not adequately defend against such amendments on the day of trial, the performance of counsel was deficient and lacked legitimate trial tactic or strategy. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

The amendment prejudiced the defendant's ability to mount a defense at trial, violating her constitutional right to notice.

II. CONCLUSION

Based on the foregoing, appellant resubmits that this case should be reversed and remanded for a new trial.

DATED this 16th day of April, 2008.



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 Appellant.)

DECLARATION OF SERVICE

I declare that on April 16, 2008, a true copy of the Reply Brief of Appellant was sent to the following persons via first-class mail, postage prepaid, in an envelope addressed as follows:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed at Vancouver, Washington this 16th day of April, 2008.

A handwritten signature in cursive script, reading "Betty Olesen", written over a horizontal line.

Betty Olesen
Legal Assistant
Steven W. Thayer, P.S.