

Original

COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON

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NO. 36768-8-II

STATE OF WASHINGTON,

Appellant.

vs.

TIMOTHY NEWHOUSE

Respondent.

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FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

**APPELLANT'S OPENING BRIEF**

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## ASSIGNMENTS OF ERROR

1. The trial court erred in granting the defense motion to suppress evidence;
2. The trial court erred in granting the defense motion to dismiss;

Error is further assigned to the following

### FINDINGS OF FACT:

- 1.2 The home was set back from the road so far as not to be visible from any public property.
- 1.6 The existence of the gate itself was an indication of Mr. Newhouse's intent to exclude persons from the property, at least on a part time basis.

Error is further assigned to the following

### CONCLUSIONS OF LAW:

- 3.1 Approaching somebody's house without invitation and without authority of law does intrude on that person's private affairs;
- 3.3 Approaching a person's home under the facts outlined above is a violation of Article I, Section 7 of the Washington State Constitution, prohibiting law enforcement from disturbing a person in his private affairs.
- 3.4 The search warrant obtained, in part, by Mr. Newhouse's statements to law enforcement was illegal because the detective had no lawful authority to be on Mr. Newhouse's premises.
- 3.5 The evidence obtained from the search warrant should therefore be suppressed as "fruit of the poisonous tree."

4.1 The Defendant's motion to suppress evidence is granted.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Was law enforcement's initial entry onto Newhouse's property along the usual access route to the property to conduct a "knock and talk" lawful?

Is a "knock and talk" considered "legitimate police business thus giving police "authority of law" to approach a rural residence along the usual access route to the residence?"

Is an ordinary access way to a residence part of the curtilage of a residence that is impliedly open to the public?

Was the trial judge correct when he concluded in his oral ruling that going to the residence to contact the property owner here as part of the investigation into a possible crime occurring on the property was "not [a] legitimate exercise of police power?"

Was the trial judge correct when he concluded in his oral ruling suppressing the evidence in this case that his ruling might be different "if there were a sign up [on Newhouse's property] that said 'police are welcome to come up and talk to me anytime?'"

I. STATEMENT OF THE CASE

In October of 2005, Detective Engelbertson of the Lewis County Sheriff's Office was serving a search warrant at 389 Hewitt Road in regards to an underground marijuana grow when he noticed water hoses that led from the residence next door at 381 Hewitt Road, the Timothy Newhouse residence. CP 67. Deputies began an investigation of Timothy Newhouse for a possible marijuana grow operation. Id. Deputies had also received information from John Johnson the Drug Task Force in Cowlitz County that Teresa Newhouse was getting marijuana from her brother Timothy Newhouse. Id. at 5; CP 67. The information provided indicated that two pounds of marijuana had been shipped to Ms. Newhouse. Id. Detectives' investigation included looking at aerial photos of Newhouse's property and checking Newhouse's power records. CP 68. Newhouse's power records indicated that a consistently large amount of power was used by the Newhouse residence. Id. Detective Engelbertson testified that he had the anonymous tip regarding Newhouse plus the hoses leading from neighbor's place to Newhouse's property, plus elevated power bills plus the Cowlitz county information that Newhouse's sister had been receiving marijuana from the defendant. 7/25/07 RP 13.

Then, as part of the investigation into Mr. Newhouse, Detective Engelbertson decided to pay a visit to the Newhouse residence using the "knock and talk" procedure. Id. 7/25/07 RP 4. Detective Engelbertson went to the Newhouse residence on January 3, 2007, during daylight, between 3:00 and 5:00 p.m. 7/25/07 RP 6. The deputies followed a long driveway/access road and passed an open gate. 7/25/07 RP 6. The Newhouse residence was not visible from any public property. CP 37.

Detective Engelbertson said that he had been by this property "12-20 times" in the past "six to eight months" and he "never saw the gate closed." 7/25/07 RP 10. At the 3.6 hearing, Detective Engelbertson reiterated, "[t]he gate was open. There was no question about whether it was open or closed." 7/25/07 RP 14. Two other officers testified that the gate to Newhouse's property was open when they went there with Detective Engelbertson. 7/25/08 RP 16,17 (Deputy Akisson); 7/25/07 RP 20 (Officer Hoium). Detective Engelbertson saw the "no trespassing" signs. Id. 6. Detective Engelbertson said that Newhouse's driveway was a "couple hundred yards long." Id. 7. The deputies did not deviate from the driveway and Detective Engelbertson met Mr. Newhouse in front of Mr. Newhouse's home. CP 32; 7/25/07 RP 7. Detective

Engelbertson identified himself as a police officer. CP 68. Deputy Engelbertson made no attempt to be secretive in his approach to the property or about his identity as a police officer. CP 32. Deputy Engelbertson told Mr. Newhouse that he was not under arrest and he was free to end the contact. CP 32. Engelbertson told Newhouse that he wanted to talk with him about his marijuana grow, asking Newhouse whether he had more than 500 plants. CP 68. Newhouse said that he had about 20-40 plants growing. Id. Newhouse said that he was supplying about five or six people with marijuana and that the money he received was just enough to keep the lights on. Id. Newhouse told Detective Engelbertson that he knew what he was doing was illegal. CP 68. Newhouse would not allow deputies to search his outbuilding where he was growing the marijuana. CP 68.

Detective Engelbertson had other officers secure the location while he applied for a search warrant for the outbuilding. CP 68. The search of the outbuilding found grow equipment such as lights, pots, fertilizer, drying racks, underground exhaust system, Ozonator, as well as seventy (70) marijuana plants in various stages of growth. CP 68. Newhouse was arrested and given his

*Miranda* warnings. Newhouse told officers that he also had some dried marijuana in his residence. Id.

Newhouse was charged with manufacturing a controlled substance (marijuana). CP 69. Charges were later amended to include a school zone enhancement. CP 62. Newhouse moved to suppress evidence, claiming that the deputies' initial entry onto his property was illegal. CP 36-44. Witnesses for the State testified that the gate to Newhouse's property was open and the trial court found that the gate was open. 7/25/07 RP 58; CP 33. Newhouse claimed that the gate was closed. 7/25/07 RP 33; CP 37; Notice of Cross Appeal 1.

After a hearing on the motion to suppress, the trial court granted Newhouse's motion to suppress, concluding that the deputies initial entry onto the curtilage of Newhouse's property was illegal. 7/25/07 RP 55-58. As part of its oral ruling suppressing the evidence, the trial court stated:

Unlike [the prosecutor], I do think that going up to somebody's house without invitation, without authority of law, does intrude on their private affairs. To say that well, okay, it's legitimate police business, to me that is the point. I know that the case law in this is confusing about what that means, but legitimate police business still has to fall under the Constitution and to just say well, I just wanted to go up and talk to him when he said I don't want to be talked to, then

that is not a legitimate exercise of police power. It would be in town. It might be here if there were a sign up that said police are welcome to come up and talk to me any time or there were no indication of that, that these other factors weren't there. But if you say well, he was on legitimate police business so therefore any contact that he had, no matter how much the individual wants to try to prevent it, then you get the Fourth Amendment swallowed by the claim of legitimate police business, so to me that is precisely the issue. Essentially this comes down to if you're not here on emergency or community care-taking functions, stay out. That is what the sign says, and that is what happens here. Yes, the police do have a duty to investigate crimes, but they have to do it in accordance with our Constitution. This fell outside that.

7/25/07 RP 57. With that, the trial court granted Newhouse's motion to dismiss.

The State filed a motion to reconsider, citing an additional case that it had not cited in its previous response brief, but the court denied the motion to reconsider without making any additional findings and without considering the Ague-Masters case that the State had asked the court to consider in its motion to reconsider.<sup>1</sup> CP 10-13; CP 9. Because granting Newhouse's motion to suppress effectively put an end to the State's case, the case was dismissed without prejudice. 7/25/07 58. The State timely filed

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<sup>1</sup> The State contacted the court reporter in regards to any "proceedings" that took place on the date the trial court denied the motion to reconsider. According to the court reporter there is no Report of Proceedings for the date that the motion to reconsider was denied.

this appeal. CP 1-6. Newhouse cross appeals the court's finding that the gate leading to his property was open. Notice of Cross Appeal 1.

## II. ARGUMENT

### A. **THE TRIAL COURT ERRED WHEN IT GRANTED NEWHOUSE'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE OFFICERS' INITIAL ENTRY ONTO THE NEWHOUSE PROPERTY WAS LAWFUL.**

A trial court's decision on 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); State v. Hagen, 55 Wn. App. 494, 498, 781 P.2d 892 (1989). "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). "On review of a suppression motion [the Court] make[s] an independent evaluation of the evidence, allowing 'great significance' to the findings; [the Court] defer[s] to the trial court on issues of credibility." State v. Mennegar

114 Wn.2d 304, 309-10, 787 P.2d 1347 (1990) (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 (emphasis added) ("entering property to speak with occupants as part of an investigation of a possible crime is legitimate police business"), citing State v. Ross, 141 Wn.2d at 313-14, 4 P.3d 130 (\*); and quoting State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) (internal quotations omitted); State v. Chausse, 72 Wn.App. 704, 866 P.2d 643 (1994) ("[p]olice officers on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access rout to a house or a walkway leading to a residence) (citations omitted). Indeed

[the] presence of a 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.

State v. Vonhoff, 51 Wn.App. 33, 39, 751 p.2d 1221 (1988) (emphasis added), citing La Fave at sec. 2.3 (1 W. LaFave, Search and Seizure (1978)). This is true even under the greater privacy protections afforded by Article I, Section 7 of the Washington State Constitution. See e.g., State v. Gave, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995) (under Article I, Section 7, police with legitimate business may enter areas of the curtilage of a residence that are impliedly open to the public such as an access route leading to a residence). 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. 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 (emphasis added), 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); State v. Vonhoff 51 Wn.App. at 40 ("the presence of 'no trespassing' signs does not increase the constitutional level of privacy interests enjoyed by the defendants" (emphasis added), citing Oliver v. United States, 466 U.S. 170, 179, 104 S.Ct. 1735, 1741, 80 L.Ed. 214 (1984); State v. Johnson 75 Wn.App. 692, 706, 879 P.2d 984 (1994) ("clearly, the existence of a 'no trespassing' sign is not dispositive of the establishment of privacy.") " The presence or absence of fences and signs is, therefore, but one factor to consider in reviewing the reasonableness of the governmental intrusion." State v. Thorsen, 98 Wn.App. 528, 534, 990 P.2d 446 (1999). 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. Again, the presence or absence of fences and signs is but one factor in considering the reasonableness of a police intrusion. State v. Hornback, 73 Wn.App. 738, 740, 871 P.2d 1075 (1994).

In the Ague-Masters case, the deputies entered the property during daylight hours and drove through an open, unlocked gate, past a sign, and proceeded down an unobstructed driveway. Ague-Masters at 98. In Ague-Masters, the Court noted,

[s]ubstantial evidence . . . supports finding that a reasonable, respectful citizen would believe that he could drive through the open gate and down the driveway to the area where the deputies stopped, despite the possible presence of a sign in the tree. Additionally, a reasonable, respectful citizen seeking to contact an occupant would believe he could follow the deputies' same unobstructed path to the backyard. The deputies did not exceed the scope of implied invitation while on Ague's property.

State v. Ague-Masters, 138 Wn.App., at 99. And, as the Court said in the Chausse case:

Ms. Chausse's argument that she has a legitimate and reasonable expectation of privacy based on the "no trespassing" signs is unpersuasive. A similar argument was . . . rejected in United States v. Traynor, 990 F.2d 1153 (9th Cir. 1993). There, the . . . Court held "the presence of a 'No Trespassing' sign [did] *not itself* create a legitimate expectation of privacy.

State v. Chausse, at 710 (emphasis added, citations omitted).

The reasoning of the Ague-Masters case should be applied in the present case and this Court should find that the officers' initial entry onto Newhouse's property was proper. Here, as in Ague-Masters, the officers were on "legitimate police business"--

investigation of a possible crime-- and the officers were thus allowed to "enter areas of the curtilage which are impliedly open, such as access routes to the house." Ague-Masters at 98. The officers did not make any attempts to conceal their identify or to enter the property surreptitiously. CP 32. Rather, the officers were identifiable as police officers and they approached the property along the usual access route during daylight hours. CP 32. As such, the officers were acting as "reasonable, respectful citizen[s] seeking to contact an occupant." Ague-Masters, 138 Wn.App. at 99. Additionally, the "intrusion" here was brief, it was outside Newhouse's home and in fact the officer did not even get the chance to knock on Newhouse's door because Newhouse met the officer in his driveway. CP 32. And, there were no "high fences, closed gates, or security devices" at the Newhouse property. CP 31-34; Ague-Masters, 138 Wn.App. at 98. Again, although the officer did see two no-trespassing signs on Newhouse's property (CP 32), "clearly, the existence of a 'no trespassing' sign is not dispositive of the establishment of privacy.'" State v. Johnson, 75 Wn.App. 692, 705, 879 P.2d 984 (1994). See also State v. Chaussee, 72 Wn.App. 710 and State v. Horn back, 73 Wn.App. 738, 871 P.2d 1074(1994) where both courts concluded that "no

trespassing" signs did not override the police officers' "implied permission" to enter an access route to the house. Also, in the present case the Newhouse property did not have "high fences, closed gates, or security devices." Chausse at 710.

Additionally in the present case, the trial court misconceives the law in regards to when officers may lawfully approach a residence. Specifically, the trial court, in its oral ruling on the motion to suppress, stated, in part, "

Unlike [the prosecutor], I do think that going up to somebody's house without invitation, without authority of law, does intrude on their private affairs. To say . . . okay, it's legitimate police business, to me that is the point. I know that the case law in this is confusing about what that means, but legitimate police business still has to fall under the Constitution and to just say well, I just wanted to go up and talk to him when he said I don't want to be talked to, then that is not a legitimate exercise of police power.. . . It might be here if there were a sign that said police are welcome to come up and talk to me any time. . .

7/25/07 RP 57 (emphasis added). But this is not the law (and the trial court did not cite any law in support of this reasoning)..

As reiterated above, it is clear that even under the Washington Constitution officers may approach a residence along usual access routes in the manner of a "reasonably respectful citizen," taking into consideration factors such as whether the

officers were sneaking onto the property (here they were not), whether there were high fences or security devices (none here) and whether an access gate was open or closed (here the gate was open). CP 31-34; Ague-Masters, Chausse, Gave, Hornback, Johnson, Jessen, Seagull, supra. In fact, not only did the trial court not cite any authority for its reasoning that police cannot approach a rural residence unless the property owner has a sign that says "police welcome," (in addition to totally ignoring the State's citation to Ague-Masters in its motion to reconsider), but the State has not been able to find any case law that supports the court's analysis as stated in its oral ruling as set out above. Indeed, the Ague-Masters, Chausse, Gave, Hornback, Seagull and Johnson, cases supra, all explain that police officers investigating a crime may enter the curtilage of a residence along the usual access way, so long as they do so as a reasonably respectful citizen. Nowhere that the State can find does the case law hold that police cannot ever approach a rural residence to talk to a homeowner unless there is "a sign up that said police are welcome to come up and talk to me any time." 7/25/07 RP 57. The trial court's ruling is simply not supported by the law.

Additionally-- anticipating that Newhouse will again cite to the same cases he did in his motion to suppress-- Newhouse's reliance on State v. Johnson, 75 Wn.App. 692, 879 P.2d 984 (1994) as supporting his argument that the officers' initial entry onto his property was illegal is misplaced because Johnson can be distinguished. This is because in Johnson, the road leading to Johnson's house was a dirt road and more importantly in Johnson, there was a closed gate that was a boundary to Johnson's property. Id. Moreover, in Johnson, the officers went to the property during darkness. Id. Furthermore, in Johnson the officers did not attempt to contact the occupants of the residence. Johnson at 705. All of these factors distinguish Johnson from the instant case because here the deputies approached the Newhouse property along the usual access route during daylight hours through an open gate-- and they then contacted Newhouse at the residence. CP 32, 33. These critical facts in the present case are different than those of Johnson and the ruling of Johnson accordingly does not apply here.

Similarly, to the extent that Newhouse will again rely on the ruling of State v. Littlefair, 129 Wn.App. 330, 19 P.3d 359 (2005), that case, too, can be distinguished from the facts of the present case. Unlike here, the officers in Littlefair conducted six days of

covert surveillance of the Littlefair property after dark, the officers wore camouflage clothing, and the officers surreptitiously approached the property from the south to avoid detection, and in addition to "no trespassing" signs there were other signs indicating the property owner's privacy intentions such as signage stating, "Gordon Road Private" and "Private Property." Id. at 336. These factors entirely distinguish the Littlefair case from the present case and Newhouse's reliance on Littlefair is misplaced.

Likewise, the new Division 3 case, State v. Jessen, \_\_\_ P.3d \_\_\_, 2008 WL 222717, can also be distinguished from the present case and Newhouse cannot rely on its ruling. In Jessen--unlike the present case--officers approached Jessen's residence by walking down a primitive, dirt road and then the officers went through a closed gate. Jessen at 3. That did not happen here because, as the court found, the gate to Newhouse's property was open. CP 33. Moreover, the officers here walked down the usual access road to Newhouse's residence while investigating a crime by approaching the Newhouse residence during daylight hours to conduct a lawful "knock and talk." CP 32.

Newhouse has also cross appealed the trial court's finding that the gate on the road to his property was closed. But this

argument is without merit. At the suppression hearing all three of the deputies testified that the gate to Newhouse's property was open. 7/25/07 RP 58. The trial court made a finding that the gate was open. CP 33. Obviously, the trial court found the deputies' testimony more credible than Newhouse's or any of his witnesses. Credibility determinations are for the finder of fact and a reviewing court will not substitute its judgment for the trial court on issues of credibility of witnesses: "We defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992). Because the issue of the open or closed gate hinged on the credibility of the witnesses and because such determinations are solely within the province of the finder of fact, the trial court's finding that the gate was open should not be disturbed on appeal.

### III. CONCLUSION

The trial court erred in granting Newhouse's motion to suppress evidence. Officers entered Newhouse's property through an open gate along the ordinary access route to his residence during daylight hours in order to question Newhouse about a possible crime. Thus, officers were at the Newhouse property on

legitimate police business, which is a proper, lawful purpose for being on the property. Because the officers were on the property lawfully, all evidence flowing from that initial entry was properly gathered and the search warrant was also properly obtained using such information. In short, as explained above, the trial court's granting of Newhouse's motion to suppress evidence was in error and was based upon a total misunderstanding of the law. The order suppressing evidence and the order dismissing the case should be reversed and the case remanded for trial.

DATED THIS 24th day of March, 2008.

BY:

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR  
  
LORI SMITH, WSBA 27961  
Deputy Prosecutor

08 MAR 26 PM 1:01

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

STATE OF WASHINGTON  
BY *Chm*  
DEPUTY

STATE OF WASHINGTON,	)	NO. 36768-8-II
Appellant,	)	
vs.	)	DECLARATION OF
	)	MAILING
TIMOTHY NEWHOUSE,	)	
Respondent.	)	
_____	)	

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, declares under penalty of perjury of the laws of the State of Washington that the following is true and correct: On **March 24, 2008**, I mailed a copy of the Opening Brief of Appellant in this matter by depositing same in the United States Mail, postage pre-paid, to the Attorney for Appellant at the name and address indicated below:

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DATED this 24 day of March, 2008, at Chehalis, Washington.

*Lori Smith*  
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