

ORIGINAL

No. 36928-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 MAR 14 PM 1:30
STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

PATRICIA SCHULTZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth D. Williams, Judge
Cause No. 05-1-00114-2

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

TABLE OF CONTENTS

APPELLANT’S ASSIGNMENTS OF ERROR.....1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3
STATEMENT OF THE CASE.....4
ARGUMENT.....4
CONCLUSION14

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Baake</i> , 44 Wn.App. 830, 837, 723 P.2d 534 (1986)	6
<i>State v. Fore</i> , 56 Wn.App. 339, 343, 783 P.2d 626 (1989).....	9
<i>State v. Fricks</i> , 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)	9
<i>State v. Kinzy</i> , 141 Wn.2d 373, 384, 5 P.3d 668 (2000).....	4
<i>State v. Lynd</i> , 54 W.App. 18, 22, 771 P.2d 770 (1989).....	5, 6, 7
<i>State v. Perrone</i> , 119 Wn.2d 538, 545, 834 P.2d 611 (1992)	12, 13
<i>State v. Raines</i> , 55 Wn.App. 459, 464, 778 P.2d 538, (1989).....	5, 6, 7
<i>State v. Riley</i> , 121 Wn.2d 22, 28, 846 P.2d 1365 (1993)	12
<i>State v. Sabbot</i> , 16 Wn.App. 929, 937-38, 561 P.2d 212 (1977)	7
<i>State v. Terrovona</i> , 105 Wn.2d 632, 643, 716 P.2d 295 (1985).....	9

Federal Cases

<i>Bell v. United States</i> , 254 F.2d 82 (D.C.Cir. 1958)	9
<i>Brinegar v. United States</i> , 338 U.S. 160, 931 L.Ed. 1879, 69 S.Ct. 1302 (1949).....	9
<i>Commonwealth v. Young</i> , 382 Mass. 448, 456, 416 N.E. 2d 944, 950 (1981).....	6
<i>United States v. Davis</i> , 458 F.2d 819, 821 (D.C.Cir. 1972)	9
<i>United States v. Fitzgerald</i> , 724 F.2d 633, 637 (8 th Cir. 1983).	13

Statutes

RCW 10.99.010.....4
RCW 10.99.030(6)(b).....5, 8
RCW 10.31.100(1).....11

Rules

RAP 10.3(b)..... 4

APPELLANT'S ASSIGNMENT OF ERROR

1. Appellant claims that the officers violated her right to privacy under Article I, §7 of the Washington State Constitution.
2. Appellant claims that the trial court erred by failing to suppress items seized from her residence.
3. Appellant claims that Officer Malone unlawfully entered her residence without a warrant.
4. Appellant claims that Officer Hill unlawfully entered her residence without a warrant.
5. Appellant claims that the officers violated her right to be free from unreasonable searches and seizures under the Fourth Amendment.
7. Appellant claims she was arrested without probable cause.
8. Appellant claims that the search warrant was unconstitutionally overbroad.
9. Appellant claims that the trial judge erred by entering Finding of Fact No. 2, which reads as follows:

On arrival, the officers went to the apartment in question and listened outside, at a closed door, to a male and female who were yelling and arguing with each other. CP 20.

10. Appellant claims that the trial judge erred by entering Finding of Fact No. 7, which reads as follows:

At that point the defendant stepped away from the door, opening it further, and the officers entered. CP 21.

11. Appellant claims that the trial judge erred by entering Finding of Fact No. 8, which reads as follows:

The officers testified that they were not expressly invited in, neither did they request permission to enter.

12. Appellant claims that the trial judge erred by entering Finding of Fact No. 9, which reads as follows:

Officer Hill asked Mr. Robertson to step outside in order that he could interview him away from the defendant. CP 21.

13. Appellant claims that the trial court erred in entering the following conclusion of law:

The officers' testimony is clear that, upon arrival at the apartment, they were able to overhear shouting and arguing coming from within the apartment, despite the fact that the door was closed.

It is clear that law enforcement officers have an affirmative duty to investigate domestic violence situations with a view to ensuring "the present and continued safety and well-being of the occupants." *State v. Raines*, 55 Wn.App. 459 (1989). See also *State v Lynd*, 54 Wn.App 18 (1989).

... It was quite feasible that the officers could think these [red blotches] were the results of an assault.

In order to ensure the safety of occupants, officers must talk to those possibly involved.

... They had the right, and duty, to be present to talk to the occupants. It is noted that neither party told them to leave and that the defendant initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave.

In conclusion, the court concludes that both officers were acting within the confines of the law. They were performing their legal duties when they entered the apartment to investigate a possible domestic violence situation. Their entry was legal and even required under state law. They were therefore lawfully in a place to observe the contraband or paraphernalia, the result of the defendant's uncooperative actions. Therefore they had, based on their observations and statements from Robinson (sic), probable cause to apply for and execute a search warrant. CP 23-24.

14. Appellant claims that the trial court erred in concluding the following in his Memorandum Opinion:

The warrant at issue specifies the crime as VUCSA which is the commonly used “shorthand” for violation of the uniform controlled substances act. The warrant specifies the items to be seized as marijuana and methamphetamine and items associated with the use and sale of those controlled substances. The information provided by Officer Hill in support of the probable cause specifies that he personally observed items with burnt marijuana, and items he recognized as used to ingest methamphetamine. With regard to the possible sale of controlled substances he observed “numerous plastic baggies” in the vicinity of the items associated with controlled substances for sale.

The search warrant was supported by probable cause, and is not overly broad as it specifies both the crime under investigation (VUCSA) and the items to be seized which are associated with that crime.

Memorandum Opinion, Supp. CP.

15. Appellant claims that the trial judge erred by denying her motions to suppress.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Officer Malone’s warrantless entry into the residence violated appellants state constitutional right to privacy under Article I, §7? Assignments of error Nos. 1-4, 15.
2. Whether Officer Hill’s warrantless entry into the residence violated appellant’s state constitutional right to privacy under Article I, §7? Assignments of Error Nos. 1-4, 15.
3. Whether the arrest of the appellant without probable cause violated her constitutional rights under the Fourth Amendment and Article I, §7 ? Assignments of Error Nos. 1-2, 5-6, 15.
4. Whether the officers lacked probable cause to believe evidence of drug sales would be found inside the residence? Assignments of Error Nos. 5, 7-8, 15.
5. Whether the search warrant was overbroad because it authorized a search for evidence of drug sales despite the absence of probable

cause to believe such evidence would be found in the residence?
Assignments of Error Nos. 5, 7-8, 15.

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts the defendant's recitation the facts set forth in her opening brief at pages 5 through 10 with the following additions:

Neither the defendant nor Mr. Robertson prevented the officers from entering the apartment. RP (8/2/05) 15, 64, 65, 88, 101, 110. In addition, neither the defendant nor Mr. Robertson asked the officers to leave the apartment. RP (8/2/05) 15, 88, 96, 110-111.

ARGUMENT

I. THE OFFICERS ENTERED APPELLANT'S HOME UNDER AUTHORITY OF LAW TO INVESTIGATE WHAT THEY BELIEVED TO BE A DOMESTIC VIOLENCE SITUATION.

A warrantless search is per se unreasonable under both the Fourth Amendment and article I, §7 of the state constitution unless it falls within a specific exception. See, e.g., *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

RCW 10.99.010 sets forth the purpose of the Domestic Violence Protection Act:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.

RCW 10.99.030 states in pertinent part:

(6)(b) A peace officer responding to a domestic violence call shall take a complete offense report including the officer's disposition of the case.

Case law in Washington recognizes the need for an exception to the warrant requirement when dealing with what is perceived to be a domestic violence situation. The need to protect and investigate potential crime in a domestic violence context necessarily overcomes the requirement for a warrant to enter a residence provided the officer has a good faith reason for the intrusion.

In *State v. Raines*, 55 Wn.App. 459, 464, 778 P.2d 538, (1989) the court stated that for a search to come within the emergency exception, the State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed. The determination of whether an emergency justifies a warrantless search must be based on the individual facts of each case. *State v. Lynd*, 54 W.App. 18, 22, 771 P.2d

770 (1989). Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, "not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis." *State v. Lynd* 54 Wn.App. at 22, citing *State v. Baake*, 44 Wn.App. 830, 837, 723 P.2d 534 (1986) (quoting *Commonwealth v. Young*, 382 Mass. 448, 456, 416 N.E. 2d 944, 950 (1981)).

In *Raines, supra*, the officers responding to a report of domestic violence did not hear any disturbance as they approached the apartment. In the instant case officers responding to a report of a disturbance heard a male and female arguing as they approached the apartment. When the appellant opened the door, she lied to the officers about the presence of another person in the apartment. If all was well, why did the appellant deliberately attempt to conceal Mr. Robertson's presence? The officers had obvious reasons to be concerned. They subjectively believed the situation required investigation for possible domestic violence. Any reasonable police officer would think the same thing.

When confronted by the officers that they heard a male yelling, appellant stood back, opened the door further and called to Mr. Robertson. At that time, the officers entered the apartment to investigate a possible

domestic violence situation. In *Raines, supra*, the trial court concluded that exigent circumstances justified the officers' entry into the apartment. This court should also find that the exigent circumstances in the instant case justified the officers' entry.

If a householder is in a position to communicate refusal of admittance, and circumstances surrounding the warrantless entry "are such that [police officers] can reasonably conclude [they are] not being refused entry, then no invitation, express or implied is necessary to make the [officers'] entry lawful." *State v. Sabbot*, 16 Wn.App. 929, 937-38, 561 P.2d 212 (1977).

In the instant case, the appellant was in a position to communicate an objection to the officers' entry if the officers misunderstood her affirmative gesture of opening the door wider. The appellant's failure to expressly object to the officers' entry in these circumstances amounted to an implied waiver of her right to exclude them. The appellant neither prevented the officers' entry nor did she ever ask them to leave.

Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants. *State v. Lynd, supra* at 23.

In the instant case, the evidence establishes that the officers believed they were responding to a domestic violence situation. Pursuant

to RCW 10.99.030(6)(b), officers responding to a possible domestic violence call have a duty to take a complete offense report including the officer's disposition of the case. Officer Malone spoke with the appellant inside the apartment while Officer Hill spoke to Mr. Robertson outside the apartment; the door to the apartment was open during the time the officers spoke to both parties. The officers were acting within the law and performing their lawful duties. Following the investigation, Officer Hill stepped back into the apartment to compare the information he got from Mr. Robertson with the information Officer Malone got from the appellant. The encounter between Officer Hill and Mr. Robertson and Officer Malone and the appellant lasted for approximately five minutes. RP (8-2-05) 145.

Officers Malone and Hill had an obligation to make sure no one else was in the apartment and to secure any evidence of domestic violence. They were not there for any other reason. Malone and Hill would have been derelict in their duties as police officers in not entering the residence to investigate a report of a possible domestic violence situation even though they ultimately discovered no emergency and no injured persons inside.

II. **THE APPELLANT WAS ARRESTED AFTER PROBABLE CAUSE WAS ESTABLISHED.**

In *State v. Fore*, 56 Wn.App. 339, 343, 783 P.2d 626 (1989), the

court stated:

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1985). This determination rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. (Citation omitted.) *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor is it a pristine "philosophical concept existing in a vacuum," but rather it requires a pragmatic analysis of "everyday life on which reasonable and prudent men, not legal technicians, act." (Citation omitted.) *United States v. Davis*, 458 F.2d 819, 821 (D.C.Cir. 1972) (quoting *Bell v. United States*, 254 F.2d 82 (D.C.Cir. 1958) and *Brinegar v. United States*, 338 U.S. 160, 931 L.Ed. 1879, 69 S.Ct. 1302 (1949)).

When Officer Hill went into the apartment to confer with Officer Malone about what they had learned regarding the possible domestic violence situation, the appellant grabbed at some things on the table and as Officer Malone was telling her to sit down again, Officer Hill saw a gun on the table. RP (8-2-05) 19.

Officer Hill asked the appellant about the gun and she told him it was loaded. Officer Hill unloaded and secured the weapon. In addition to the appellant's actions revealing the weapon, she also revealed a smoking device, which was in the ashtray on the table near the weapon. The officers recognized the smoking device as a pipe used to ingest marijuana. RP (8-2-05) 19-20.

Officer Hill asked the appellant about the pipe and she said it belonged to her son who lived in Vermont. The appellant was asked if she would give consent to check the table for any other narcotics and the appellant said she would. Then the appellant stood up and began grabbing at items on the table. At that time, Officer Malone handcuffed her to prevent her from grabbing anything else on the table. Officer Malone was concerned because the officers did not know what was on the table – more evidence of narcotics or possibly more weapons. Officer Malone advised the appellant she was not under arrest but was being handcuffed for safety reasons. RP (8-2-05) 21-23.

RCW 10.31.100 states in pertinent part:

A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, . . . involving the use or possession of cannabis . . . shall have the authority to arrest the person.

It appears under RCW 10.31.100 that Officers Malone and Hill had the authority to arrest the appellant after seeing the pipe they recognized as a device used to smoke marijuana. The appellant knew the marijuana pipe was on the table in the ashtray because she put it there RP (8-2-05) 68. Because the appellant put that marijuana pipe in the ashtray on the table and there was residue in it, the officers drew a logical conclusion that the appellant had used or possessed cannabis. In fact, she was in possession of cannabis based on the residue in the pipe.

The appellant was arrested based on probable cause established when the officers noticed residue in the marijuana pipe. III.

III. **APPELLANT INCORRECTLY ANALYZES THE SEARCH WARRANT AS OVERBROAD AND IN VIOLATION OF THE FOURTH AMENDMENT IN FOCUSING ON LANGUAGE PERMITTING A SEARCH FOR ITEMS**

**CONNECTED WITH THE SALE OF CONTROLLED
SUBSTANCES.**

In an application for a search warrant officers must “describe with particularity the things to be seized . . .” *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993), citing *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable. *Riley, supra* at 28, citing *Perrone, supra* at 547.

In the instant case it is abundantly clear that the officers were investigating a possible violation of the uniform controlled substance act. Furthermore, the items the officers were searching for were stated with sufficient particularity. The fact that Officer Hill included items associated with the sale of controlled substances does not make the warrant overbroad, as probable cause existed for such. Officer Hill observed plastic baggies at and around the table where appellant was seated. In addition, Officer Hill saw small tin containers in the bedroom when he and Mr. Robertson went to look for appellant’s anti-anxiety medication and on the table where appellant was seated. The standard here is probable cause, not proof beyond a reasonable doubt. The fact that no actual evidence of sales was discovered when the search warrant was executed is not dispositive.

In *State v. Perrone, supra* at 556, the court addressed severability stating;

Under the severability doctrine, “infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant” but does not require suppression of anything seized pursuant to valid parts of the warrant. **United States v. Fitzgerald**, 724 F.2d 633, 637 (8th Cir. 1983).

In the instant case, Officer Hill’s affidavit and description to Judge Williams was specific and particular stating the crime involved, the probable cause to request the warrant, the kinds of items to search for, and the place to be searched. Should this Court determine that the plastic baggies on and around the table along with the tin containers on the table and in the bedroom do not constitute sufficient probable cause to look for further indications of drug sales, the State would ask this Court to sever that portion of the warrant and uphold the remainder of the warrant. The warrant is sound and the seized items should not be suppressed.

/

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction for unlawful possession of methamphetamine.

DATED this 12th day of March, 2008 at Port Angeles, Washington.

Respectfully submitted,

DEBORAH S. KELLY
Prosecuting Attorney



Carol L. Case, WABA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,
Respondent,

NO. 36928-1-II

vs.

AFFIDAVIT OF SERVICE BY MAIL

PATRICIA SCHULTZ,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
03 MAR 14 PM 1:30
STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 13th day of March, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Jodi Backlund/Manek Mistry
Backlund & Mistry
203 Fourth Ave. East, Suite 404
Olympia, WA 98501

Patricia Schultz
3035 5th Avenue, #A-1
Sequim, WA 98382

Elaine L. Sundt
Elaine L. Sundt

SUBSCRIBED AND SWORN TO before me this 13 day of March, 2008.



Doreen Hamrick
(PRINTED NAME:) Doreen Hamrick
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 3/30/2010