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COURT OF APPEALS
DIVISION II

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

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NO. 37860-4-II

STATE OF WASHINGTON

Respondent,

vs.

Rhonda Hos

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 07-1-00168-4

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I Restatement of Issues Presented

Defendant's appeal presents two issues:

- A. Deputy Post entered Ms. Hos home without a warrant. Were his actions authorized under the "community caretaking" exception to the warrant requirement?

- B. Did Ms. Hos validly waive her right to a jury trial?

II Statement of Facts

On September 20, 2007, on or about 10:10 a.m. CPS caseworker Nicole Edwards contacted Jefferson County Sheriff's Deputy Brian Post and requested assistance in evaluating the living condition of three children at the Hos/Yakulic residence, 255 South Maple, Port Hadlock, WA. Specifically there were concerns of dangerous conditions causing injuries to the children's feet and a report that the children had been driven to school by an intoxicated person.

On arriving at the residence, Deputy Post knocked twice, loudly on the front door, without results. To the left of the door is a large window. Deputy Post looked in the window and saw Rhonda Hos sitting on a couch a few feet from the door. Hos' head was

down on her chest and the Deputy could not tell if she was breathing. Deputy Post struck the door several times with his hand, but there was no response from Ms. Hos. Deputy Post became concerned for Ms. Hos' safety, opened the unlocked door, and yelled her name loudly as he entered. Ms. Hos did not move for a few seconds then she opened her eyes and slowly looked up. Deputy Post formed the opinion that Ms. Hos was heavily under the influence of drugs because her eyes were red and watery; her speech was slurred, slow, and confused; and she did not smell of alcohol.

Deputy Post saw, next to her on the couch, a small butane torch type lighter which methamphetamine users commonly use to heat the drug. Deputy Post told Ms. Hos why he and Ms. Edwards were there and asked permission to look around the home to check on the children's living conditions. Ms. Hos said Ms. Edwards was free to look through the residence.

Ms. Hos was wearing a jacket and Deputy Post could see the pockets were full. Since she was so heavily under the influence, he asked her if there was anything in her pockets, such as weapons, that he should know about. Ms. Hos said there was not. Deputy Post asked Ms. Hos if she would be willing to empty

her pockets. She said she would but then simply patted her pockets, stood up, and did not empty them. Deputy Post could now see in her open, left jacket pocket a used, glass pipe commonly used to smoke methamphetamine. Deputy Post then arrested Ms. Hos for Use of Drug Paraphernalia. In a search incident to arrest, Deputy Post found two plastic baggies containing what later field tested positive for methamphetamine.

The children, ages 6, 10, and 13, were signed into protective custody. Ms. Hos was charged with Possession of Methamphetamine and Child Endangerment.

III. Procedural History

Ms. Hos filed a Motion to Suppress evidence found subsequent to the warrantless entry. The motion was heard and denied on February 1, 2008. RP 78.

A pretrial hearing was held on February 15, 2008. MS. Hos was present. Ms. Hos' attorney tells the court the defense is "willing to go forward on Count I, the possession charge, on stipulated reports." RP 86. The prosecution demands that the Stipulated Bench Trial go forward on both charges and no agreement is reached. RP 86.

A pretrial hearing was held on June 20, 2008, before Commissioner James Bendell. The Prosecutor was Scott Rosenkrans and Ben Critchlow represented Ms. Hos. At the start of the hearing Mr. Critchlow states, "Judge, Ms. Hos is present. It's our intent, the party's intent today... to ask the court to review a couple of documents on stipulated facts for a bench trial. It's Ms. Hos' intent to appeal a pre-trial suppression order denying her motion, and this is the most efficient way to get that up on appeal." RP 100.

The stipulated facts shown the judge are the police report and the lab report on the methamphetamine. RP 101. Based on these facts and the agreement of the parties the judge finds Ms. Hos guilty of possession of methamphetamine and the state dismissed the charge of Child Endangerment. A Notice of Appeal and a Judgment and Sentence were signed the same day.

Argument

IV. The police warrantless entry was justified under the “community caretaking” exception and did not violate Ms. Hos privacy rights

Generally, under both the Fourth Amendment to the U.S. Constitution and Article 1, Section 7, of the Washington Constitution, a police officer's seizure of a criminal suspect must be supported by a judicial warrant based on probable cause. *State v. Acrey*, 148 Wn.2d at 745-46, 64 P.3d 594 (2003); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

A warrantless seizure is presumed unreasonable, and therefore in violation of both the federal and state constitutions, unless the State shows that it falls within one of the exceptions to the warrant requirement. *State v. Acrey*, 148 Wn.2d at 745-46, 64 P.3d 594; *State v. Kinzy*, 141 Wn.2d at 384, 5 P.3d 668 (2000).

A well-recognized exception to the Fourth Amendment requirement for a warrant is "community caretaking." *State v. Acrey*, 148 Wn.2d at 749-50, 64 P.3d 594. In Washington, the community caretaking function exception to the warrant requirement encompasses the search and seizure of automobiles, routine checks on health and safety, and emergency aid. *State v. Acrey*, 148 Wn.2d at 749-50, 64 P.3d 594.

In the case of routine checks on health and safety, the proper determination is whether an officer's encounter with a person is reasonable, a determination based on balancing the individual's interest in freedom from police interference against the public's interest in having the police officers perform a community caretaking function. *Acrey*, 148 Wn.2d at 750, 64 P.3d 594.

Police officers may enter a building without a warrant when facing exigent circumstances (emergency exception). The exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property." *State v. Schlieker*, 115 Wn.App. 264, 270, 62 P.3d 520 (2003). The emergency exception justifies a warrantless search when (1) the officer subjectively believes that someone needs assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched. *State v. Lawson*, 135 Wn.App. at 434-35, 144 P.3d 377 (citing *State v. Kinzy*, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000)). When analyzing these factors, we view the officer's actions as the situation appeared to the officer at the time. *Lawson*, at 435, (citing *State v. Lynd*, 54 Wn.App. 18, 22, 771 P.2d 770 (1989)).

Rendering aid or assistance through a health and safety check is a hallmark of the community caretaking function exception. Otherwise a police officer could be considered derelict by *not* acting promptly to ascertain if someone needed help. *State v. Gocken*, 71 Wn.App. 267, 276, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024, 875 P.2d 635 (1994).

In the instant case, Deputy Post was asked by Ms. Edwards to assist her with her visit to Ms. Hos residence to check on the children's living conditions. Deputy Post then observed Ms. Hos in possible distress, that is, she was in plain view, close to the door, and unresponsive to loud knocking. At that time, Deputy Post had a reasonable suspicion that Ms. Hos might be having a medical problem and need emergency assistance. Once he entered the room and she began to respond, the emergency exception abated. However, at the same time, her red, watery eyes; and slow, slurred, confused speech; and lack of any alcohol odor gave rise to an articulable suspicion of drug-based intoxication. At this point he commenced a Terry stop to investigate possible illegal drug use.

Among those categorical exceptions to the warrant requirement in which it is predetermined that a warrantless seizure is reasonable are brief investigative stops, also referred to as stop

and frisk searches or Terry stops. A police officer may conduct an investigative stop based on less evidence than is needed for probable cause to make an arrest. A brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime. *Acrey*, 148 Wn.2d at 747. Police officers making a lawful investigative stop may protect themselves by conducting a search for concealed weapons whenever the officer has reason to believe that the suspect is armed and dangerous. *Ibid* at 747. Here, Deputy Post initiated a Terry stop based on Ms. Hos symptoms of intoxication without an accompanying odor of alcohol. Deputy Post did not frisk Ms. Hos for weapons, but he did ask her to empty her full pockets to show him she did not have any weapons. When she stood up, Deputy Post saw a glass drug pipe in her open pocket and arrested Ms. Hos for Use of Drug Paraphernalia. A search subsequent to arrest located illegal drugs in her pocket.

Because the Deputy legally contacted Ms. Hos under the community caretaking exception and detected evidence sufficient to justify a Terry investigative stop, the evidence was lawfully obtained

and the state respectfully requests the defendant's motion be denied.

A. The "community caretaking" exception is not narrower under Article I, Section 7 of the Washington State Constitution than under the U.S. Constitution.

Ms. Hos avers that "community caretaking" under article I, section 7 is narrower than under the U.S. Constitution, yet cites no authority. Ms. Hos then asserts that Deputy Post exceeded the legitimate bounds of community caretaking because he failed to pursue the least intrusive means available to check on her health and safety.

Actually, this court has explicitly adopted the federal standard. The emergency exception serves an important purpose: it allows police to carry out their community caretaking function to protect citizens and property. *State v. Johnson*, 104 Wn.App. 409, 417, 16 P.3d 680 (2001). The officers may not know the exact nature of the need, yet they know that something is amiss. *Johnson* at 417. ...[W]e adhere to the federal standard. *Johnson* at 417.

An officer may search without a warrant when the officer subjectively believes that someone likely needs assistance for health or safety reasons, the belief is objectively reasonable, and

the officer has a reasonable basis to believe that the person needing assistance is in the place searched. *State v. Gocken*, 71 Wn.App. 267, 276-77, 857 P.2d 1074 (1993). If these requirements are met and the search is not a pretext for an investigation, no greater protection against an unreasonable search is needed. *State v. Johnson*, 104 Wn.App. 409, 16 P.3d 680 (2001).

In this case, Deputy Post saw Ms. Hos to be unresponsive and subjectively believed her likely to need urgent medical assistance. His entry into her house to determine whether aid was required was not a pretext for an investigation and was a valid warrantless entry under the “community caretaking” exception.

Appellant’s motion should be denied.

B. Article I, section 7 does not require police to use the least intrusive means of “community caretaking.”

See argument A above.

Appellant’s motion should be denied.

V. Ms. Hos proposed and knowingly agreed to waive her jury trial right, on the record, in order to have this appeal progress as rapidly as possible.

Ms. Hos asserts that because she did not sign a written waiver of her jury right or orally ratify her attorney's oral waiver, her conviction must be reversed.

Ms. Hos cites *State v. Treat*, 109 Wn.App. 419, 35 P.3d 1192 (2001), in support of her position. However, *Treat* is distinguishable. In *Treat*, the defendant was a resident of Idaho charged with eluding and there was no record of any waiver of his jury right. Here, the record shows Ms. Hos attorney orally requested a bench trial, Ms. Hos was present in court, Ms. Hos did not object, and the prosecutor agreed. RP 100.

The right to a jury trial is constitutional, and a waiver of a jury must be "knowingly, intelligently and voluntarily made." *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981). The waiver must either be in writing, or done orally on the record. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); *State v. Rangel*, 33 Wn.App. 774, 775-76, 657 P.2d 809 (1983). The State bears the burden of proving a valid waiver. *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485 (1995).

The evidentiary requirement of CrR 6.1(a) is not constitutionally mandated. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). Generally, to preserve error for consideration on appeal, the alleged error must be called to the trial court's attention. *Id.*

Here, Ms. Hos and her attorney negotiated the stipulated bench trial between February 15 and June 20, 2008. Her contention that her jury trial waiver was improper because of lack of written or oral ratification must be rejected because 1) her negotiation over a four month period and failure to object on two discussions on the record show oral ratification; and 2) she failed to call the alleged error to the attention of the trial court.

Appellant's motion should be denied.

III. CONCLUSION

Because the warrantless entry was valid under the "community caretaking" exception and the waiver of jury trial was knowingly, voluntarily and intelligently made, the State respectfully requests the court to deny Appellant's motion.

Respectfully submitted this 5th day of December, 2008.

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Thomas Brotherton", written over a horizontal line.

By: Thomas Brotherton , WSBA # 37624
Deputy Prosecuting Attorney

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STATE OF WASHINGTON,
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Defendant.

Case No.: 37860-4-II
Superior Court No.: 07-1-00168-4

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 15th day of December, 2008, I mailed, postage prepaid, a copy of the State's

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

Dated this 15th day of December, 2008, at Port Townsend, Washington.

[Signature]
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DECLARATION OF MAILING
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