

NO. 38095-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD HOLTZ KEAL,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's arrest was unlawful because the officers made a warrantless, nonconsensual entry into a residence to effect the arrest when no exigent circumstances existed in violation of the Fourth Amendment to the United States Constitution and Wash. Const. art. 1, section 7.

Issue Pertaining to Assignment of Error

Is reversal of appellant's convictions required where officers made a warrantless, nonconsensual entry into a private home to arrest appellant when no exigent circumstances existed and the officers had ample time to obtain a warrant?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On May 22, 2007, the State charged appellant, Ronald Holtz Keal, with one count of assault in the third degree, one count of resisting arrest, and one count of criminal trespass in the second degree. CP 1-2; RCW 9A.36.031(1)(g), 9A.76.040(1), 9A.52.080(1)(2). On October 11, 2007, defense counsel moved to dismiss all the charges and the court denied the motion on October 12, 2007. 2RP 4-77, 3RP 3-8.

¹ There are 12 volumes of verbatim report of proceedings: 1RP - 05/22/07; 2RP - 10/11/07; 3RP - 10/12/07; 4RP - 10/17/05; 5RP - 10/18/07; 6RP - 10/22/07; 7RP - 10/23/07; 8RP - 10/30/07; 9RP - 12/21/07; 10RP - 04/04/08; 11RP - 05/02/08; 12RP - 07/18/08.

Following a trial before the Honorable Frank E. Cuthbertson and the court's mid-trial dismissal of the criminal trespass charge, a jury found Keal guilty of third degree assault and resisting arrest on October 30, 2007. Supp CP ____ (Order of Dismissal, 06/10/09); CP 105, 106; 6RP 262-64, 8RP 405. On December 7, 2007, Keal filed a motion to dismiss counsel and the court granted the motion on December 21, 2007. CP 108; 9RP 11. Newly assigned counsel filed a notice of appearance on January 25, 2008. Supp CP ____ (Notice of Appearance, 01/25/08). On May 2, 2008, defense counsel moved for a new trial based on ineffective assistance of trial counsel which the court denied. 11RP 3-15

At sentencing on July 18, 2008, defense counsel asked the court to impose an exceptional sentence downward based on the mitigating circumstances of the case. 12RP 10-14; Supp CP ____ (Defendant's Sentencing Memorandum, 07/18/08). The court sentenced Keal to 90 days in confinement for resisting arrest in the second degree but suspended the sentence and imposed an exceptional sentence of no confinement with 9 to 18 months of community custody for third degree assault. CP 143-44, 149-50, 156-60. On January 9, 2009, the court entered an order nunc pro tunc to July 18, 2008, correcting the community custody to 5 months and accordingly terminated the community custody.

Supp CP___(Motion and Order Correcting Judgment and Sentence, 01/09/09).

2. Substantive Facts²

In January 2007, Kathie Offner, the assistant property manager at Woodmark Apartments, believed that Ronald Keal was living at Deborah Keal's apartment as an "unauthorized resident" when she started noticing him around the apartment everyday. 5RP 58-60. Offner saw Ronald several times a day, smoking outside the apartment, loitering, and working on his car, which violated the apartment community rules. 5RP 61-62. Offner approached Deborah and Ronald about not complying with the rules and when her warnings were constantly ignored she began issuing 10-day notices to comply or vacate. 5RP 62-64, 85. Sometime in February or March, Offner issued a 10-day notice informing Deborah that Ronald was staying at her apartment as an "illegal occupant" and he had to apply for residency or vacate the premises. 5RP 65. On March 31, 2007, Deputy Kevin Fries of the Pierce County Sheriff's Department, who worked as a security guard for Woodmark Apartments, served Ronald with a trespass notification. Offner authorized the notification, but Ronald was still allowed to "visit anybody." 5RP 68-70, 81-82, 91-92. Thereafter,

² For purposes of this brief, because Ronald Keal and Deborah Keal have the same last name they are referred to by their first names.

Ronald came into the office and applied for residency. His application was denied on April 23, 2007. 5RP 65, 70-71.

Offner continued to see Ronald on the property and saw him several times throughout the day on May 18, 2007. 5RP 74-76. While on a ride-along for a couple of hours with Deputy Fries, who was patrolling the apartment complex, she saw Ronald “walking kind of around the corner from ‘B’ building to ‘A’ building.” 5RP 76-79. Deborah lived in apartment A-9. 5RP 60. Fries parked and “got out, approached Ronald, started talking to him, questioning him.” 5RP 80. Offner could not hear much of the conversation because the window was rolled up but heard Fries ask Ronald, “What are you doing?” 5RP 80. She thought she heard Ronald reply, “I’m looking for somebody” or “Talking to somebody.” 5RP 81.

Offner saw Ronald and Fries walking and talking and then they went into the stairwell, “I don’t know how many minutes later about 12 patrol cars showed up, and then I got out of the vehicle because residents were coming out and were very upset.” 5RP 83. She tried to control the situation by asking the residents to go back into their apartments. 5RP 83. Offner did not see Ronald and Fries again until officers placed Ronald in a patrol car. 5RP 83-84.

Deputy Fries testified that he first encountered Ronald around Christmas 2006 when he was stringing Christmas lights up the stairway. It was after 10 p.m. and Ronald and Deborah were outside talking loudly so Fries asked them to keep it down. 5RP 129-30. Fries had a couple more interactions with Ronald when he was attempting to make an arrest at the Woodmark Apartments in unrelated incidents. During one incident, Ronald and other residents came out to see what was going on because Fries used his taser on someone. 5RP 130-32, 6RP 182-84.

After Fries learned from management that Ronald was not a resident of Woodmark Apartments, he told Ronald, “you’re more than welcome to come and visit who you’re going to visit, but you can’t hang out in the stairwell. You can’t flag cars in the parking lot. You can’t drink beer in the parking lot.” 5P 133-34. On March 30, 2007, Fries served Ronald with a trespass notification because he was working on his car in the parking lot in violation of the rules. 5RP 134-39. After giving Ronald the notification, Fries told him that he could still visit Deborah, “I said that’s not a problem, but you have to walk in from the street. You have to be consistent with direct travel when you come in here. You have to walk from the street straight to that apartment, Apartment No. 9 and you have to leave.” 5RP 140.

On May 18, 2007, Fries was patrolling the apartments with Kathy Offner riding along in his patrol car. 5RP 141-42. Fries saw Ronald walking down the sidewalk, talk to a female, and then walk in front of “B” Building. 5RP 144, 6RP 190. Fries pulled into the parking lot and when Ronald saw him park, he walked “back toward ‘A’ Building.” 5RP 145-46. Fries got out of his car and approached Ronald, “I said, Mr. Keal, you’re not supposed to be anywhere else on the property. What are you doing?” 5RP 147. Ronald told him he was talking to somebody and was going back to his apartment. 5RP 147-48. When Fries told Ronald that he was not supposed to be talking to people while on the property, Ronald pointed his finger at him in a threatening manner. 5RP 148. Fries told Ronald that he was under arrest for trespassing and called “for additional units because I could tell he was getting confrontational.” 5RP 148-49.

While Fries and Ronald stood at the stairwell, Deborah came out and stepped in between them. When Fries told her that Ronald was under arrest for trespassing, they both “walked backwards” into her apartment. 5RP 149. Fries tried to follow them into the apartment but Ronald slammed the door and “pinned my foot in the door.” 5RP 150. Ronald told Fries that he “wasn’t welcome.” 6RP 174. Fries informed Ronald that he was resisting arrest and “[h]e says, no, I’m not resisting. I said,

then step out here and be handcuffed. He says no. I says, well, that's resisting." 5RP 150.

When other units arrived in about three and a half minutes, Ronald backed off the door so Fries and two other deputies pushed the door open. 5RP 152. Fries entered the apartment with deputies Wylie and Maas and told Ronald he was under arrest. 5RP 152. Ronald "got into a Karate stance" so Fries applied his taser, hitting Ronald in the chest. 5RP 153. Ronald started flailing his arms and hit Fries in the chest and jaw and knocked him over a chair. 5RP 153. When Fries got up, the other two deputies had Ronald on his back on the floor and Ronald was kicking his legs. 5RP 153-54. Fries applied the taser to Ronald's abdomen but it had no effect so Fries subdued him by spraying him in the face with pepper spray. 5RP 154-55. The deputies handcuffed Ronald, placed him under arrest, and called the fire department to cleanse his eyes. 5RP 155, 162.

Deputy Philip Wylie testified that he arrived at the Woodmark Apartments and saw Deputy Fries on the second floor in front of a door to an apartment. 6RP 232-33. Wylie walked up to the apartment and saw that Fries had his right foot in the door and his hands were up against the door. 6RP 235. A man was just inside the door trying to close it and a woman was behind him. 6RP 235-36. Fries was telling the man that he

was under arrest. 6RP 238. Wylie identified Ronald as the man in the apartment. 6RP 236-37.

When Fries managed to push the door open, Ronald started “backpeddling backwards” and appeared to take “some type of like a fighting stance” but was not engaging in any physical contact. 6RP 237, 250. Fries and Wylie moved forward into the apartment and Ronald kept backpeddling, flailing his arms, and hitting Fries. 6RP 238-40. Wylie gave a verbal command to stop resisting and tried to take Ronald down to the ground by holding his hair. 6RP 239. Some of Ronald’s “hair came out.” 6RP 242. Then Fries deployed his taser, hitting Ronald in the chest. 6RP 240-43. When the taser failed, Fries “pulled out his OC spray and did one burst in Mr. Keal’s face.” 6RP 243. After Fries used his pepper spray, Ronald complied and they placed him in handcuffs. 6RP 243.

On May 18, 2007, Antonia Smith was visiting the Woodmark Apartments and saw Ronald as she returned to the apartments from a nearby 7-Eleven. 6RP 268-70. While she was talking to Ronald as they started walking to Deborah’s apartment, Deputy Fries approached them from behind in an aggressive manner. 6RP 269-72, 277-78. When they kept walking, Fries said, “you can’t walk away from me because I’m an officer of the law,” and he grabbed Ronald’s left shoulder. 6RP 277-28. Smith got scared and moved away from them. 6RP 278. Fries and Ronald

continued walking to Deborah's apartment and Smith heard Fries telling Ronald that he was trespassing. When they got to the apartment, Deborah came out with papers in hand, saying "he can be here, he's not trespassing." 6RP 278-79. Smith saw Ronald and Deborah go into the apartment and Fries put his foot in the door. 6RP 280. Suddenly, several officers showed up causing "[a] lot of commotion. 6RP 274, 281-82. Smith heard sounds of a taser and a female saying "you're going to kill him." 6RP 274. Smith's view was obstructed because "[t]here were too many officers." 6RP 274.

Mechelle West lived in apartment A-10 at the Woodmark Apartments next door to Deborah. 6RP 286. On May 18, 2007, West was standing outside her front door when she saw Ronald and Deputy Fries at Deborah's apartment. 6RP 287-88. Then Deborah came out holding her lease and she told Fries that she had permission to have Ronald as a visitor. 6RP 293-94. Fries said Ronald was trespassing but West never heard him tell Ronald that he was under arrest. 6RP 288, 292, 295. Fries "was being very aggressive" so Ronald and Deborah backed into the apartment. 6RP 301. When Ronald tried to close the door, Fries put his foot in the door and began pushing on the door. 6RP 287-89. Fries kept saying that Ronald was trespassing, but West was present earlier that day when the property manager told Ronald that "he had permission to be on the

premises as long as he came and went.” 6RP 303-04. Fries made his way into the apartment and the door closed but West heard yelling and a sound of a taser at least six times. 6RP 289-90, 298-99. Within minutes, several officers arrived and management told everyone to go back into their apartments. 6RP 289-90, 292-93.

Deborah Keal testified that she knew Deputy Fries as the security guard for the Woodmark Apartments where she lived. 6RP 308. On May 18, 2007, she heard Fries arguing with her husband, Ronald, in the stairwell in front of her apartment. 6RP 307-10. She went outside and saw Ronald backing up and Fries coming toward him so she ran back inside and got her lease. 6RP 310-11. She shook her lease at Fries and told him that she had a right to have visitors. 6RP 321. Deborah knew Fries “as somebody who harassed people.” 6RP 322.

Deborah and Ronald went into her apartment and she tried to shut the door but Fries put his foot in the doorway. Deborah told him that he did not have a right to enter her apartment and told him to get out. 6RP 311, 315. Fries said Ronald was under arrest and pushed his way into the apartment with another deputy following him. 6RP 311. Fries pulled out his taser and deployed it nine to ten times, striking various parts of Ronald’s body. 6RP 312-13. Ronald never tried to hit Fries. 6RP 312. Deputy Wylie was right behind Fries and within two minutes six or seven

officers rushed in. 6RP 315-16. 326-27. When Deborah told them to get out of her house, one officer told her to shut up. 6RP 327. A couple of officers tried to hold Ronald and Fries used his taser the entire time until they were able to place Ronald in handcuffs. 6RP 327-28.

C. KEAL'S ARREST WAS UNLAWFUL WHERE THE OFFICERS MADE A WARRANTLESS, NONCONSENSUAL ENTRY INTO A RESIDENCE TO EFFECT THE ARREST WHEN NO EXIGENT CIRCUMSTANCES EXISTED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASH. CONST. ART. 1, SEC. 7.

Reversal is required because the officers made a warrantless, nonconsensual entry into a private home to arrest Ronald Keal when no exigent circumstances existed and they had ample time to obtain a warrant.

Both the Fourth Amendment to the United States Constitution and Article 1, Sec. 7 of the Washington State Constitution prohibit a warrantless, nonconsensual entry into a constitutionally protected area, such as a private home. State v. Morgavi, 58 Wn. App. 733, 735, 794 P.2d 1289 (1990)(citing State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986), State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part, State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)).

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639

(1980). “To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.” *Id.* at 588-89 (quoting United States v. Reed, 572 F.2d 412, 423 (1978)).

In the absence of exigent circumstances, the Fourth Amendment to the United States Constitution prohibits police from making a warrantless, nonconsensual entry into a suspect’s home in order to make a routine felony arrest. State v. Le, 103 Wn. App. 354, 359, 12 P.3d 653 (2000)(citing Payton, 445 U.S. at 576)). Exigent circumstances justifying warrantless police entry into a home to carry out an arrest may be found where: (1) grave offense, particularly a violent crime, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not apprehended; and (6) the entry is made peaceably. *Id.* (citing Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970)). Five additional examples of exigent circumstances include: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4)

mobility of the vehicle; and (5) mobility or destruction of the evidence. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). The State has the burden of proving an exception to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

In State v. Counts, police responded to a burglary at the clubhouse of a golf course and apprehended a suspect in some nearby bushes. Under interrogation, the suspect told police that Fred Counts had been with him. The police went to the Counts home to arrest Counts but his father refused to allow the police to enter without a warrant. An argument ensued and the police entered the home without a warrant or consent. Counts ran into the kitchen, picked up a butcher knife, and moved toward the officers, but his father intervened and he was arrested without incident. Counts, 99 Wn. 2d at 59. The State charged Counts with second degree burglary and second degree assault. A jury found him not guilty of the burglary but guilty of the assault. Id. The Washington Supreme Court reversed the assault conviction, concluding that the warrantless entry by the police is precisely the kind of conduct prohibited under Payton. Counts, 99 Wn. 2d at 59-61.

As in Counts, the deputies here made a warrantless, nonconsensual entry into a private home to arrest Ronald Keal. Deputy Fries followed Ronald to his wife's apartment to arrest him for allegedly trespassing on

the property. 5RP 145-49. Deborah heard them arguing in the stairwell to the apartment and came outside. 6RP 307-10. When she saw Ronald backing up and Fries coming toward him, she ran back inside and got her lease. She displayed the lease and told Fries that she had a right to have visitors. 6RP 310-11, 321. Ronald and Deborah went into her apartment and tried to shut the door but Fries put his foot in the doorway. 5RP 149-50, 6RP 311-15. Fries called other units and when they arrived, Fries and two other deputies pushed their way into the apartment. 5RP 150-52. During the incident, Deborah refused entry into her apartment:

- Q. Now, at anytime, does Ronald enter into your apartment?
- A. Yes, he does.
- Q. Okay. And do you close -- do you or Ronald close the door behind him?
- A. I closed the door.
- Q. Were you able to close it shut?
- A. No.
- Q. Why was that?
- A. Officer Fries had put his foot in the doorway.
- Q. Did you ever inform Deputy Fries that he was not welcome?
- A. Yes. I told him you don't have a right in my apartment.

6RP 311.

Without a warrant and without consent, the deputies forced their way into the apartment:

Q. Okay. Now, when you -- Deputy Fries stuck his foot in the door, were you trying to close the door?

A. Yes, I was.

Q. Okay. You were applying pressure to the door?

A. It's my apartment.

Q. At anytime, did you ask Deputy Fries to remove his foot?

A. Yeah, I told him to get out.

6RP 315.

Q. And did Deputy Fries ever enter your apartment?

A. He pushed his way in my apartment.

Q. And did Deputy Fries enter into our apartment?

A. Yes, he did.

Q. When Deputy Fries entered into your apartment, were there any other deputies following him?

A. Yes, one.

Q. And what happened once Deputy Fries entered the apartment?

A. He pulled this Taser and tasered my husband.

6RP 311-12.

Clearly, the warrantless, nonconsensual entry into the private home using excessive force was unlawful because no exigent circumstances existed. The record substantiates that Ronald was only suspected of criminal trespass which is not a violent crime, he was not armed, there was no danger to the officers or the public, and the entry was not made peaceably. Dorman, 435 F.2d at 392-93. Furthermore, Deputy Fries had time to properly obtain a warrant. “Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.” State v. Leach, 113 Wn.2d 745, 744, 782 P.2d 1035 (1989)(quoting United States v. Impink, 728 F.2d 1228, 1230 (9th Cir. 1984)).

As the United States Supreme Court emphasized in Payton, when starting with the premise that, except in carefully circumscribed instances, the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant, “an arrest of the person involves an even greater invasion of privacy and should therefore be attended with at least as great a measure of constitutional protection.” Payton, 445 U.S. at 581-82.

Accordingly, reversal is required because the warrantless, nonconsensual entry into the private home to arrest Ronald Keal was unlawful. Counts, 99 Wn.2d at 60-61.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Keal's convictions for third degree assault and resisting arrest.

DATED this 2nd day of November, 2009.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

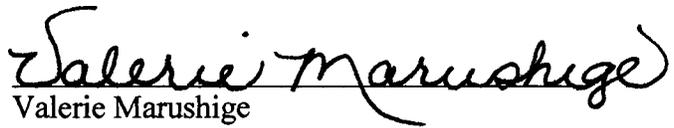
Attorney for Appellant, Ronald Holtz Keal

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Ronald Holtz Keal, 2011 East 57th Street, Tacoma, Washington 98407.

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

DATED this 2nd day of November, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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