

FILED  
COURT OF APPEALS  
DIVISION TWO

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NO. 38095-1-II

STATE OF WASHINGTON

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD HOLTZ KEAL,

Appellant.

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

The Honorable Frank E. Cuthbertson

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
REVERSAL IS REQUIRED BECAUSE KEAL’S ARREST WAS UNLAWFUL WHERE THE OFFICERS MADE A WARRANTLESS, NONCONSENSUAL ENTRY INTO A RESIDENCE TO EFFECTUATE THE ARRREST WHEN NO EXIGENT CIRCUMSTANCES EXISTED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASH. CONST. ART. 1, SEC. 7.....	1
B. <u>CONCLUSION</u> .....	5

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Counts</u> , 99 Wn.2d 54, 659 P.2d 1087 (1983) .....	4
<u>State v. Le</u> , 103 Wn. App. 354, 12 P.3d 653 (2000) .....	4
 <u>FEDERAL CASES</u>	
<u>United States v. Santana</u> , 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) .....	1
<u>Warden v. Hayden</u> , 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) .....	1, 2
<u>Washington v. Chrisman</u> , 455 U.S. 1, 102 S. Ct. 812, 70 L. Ed. 2d 1087 (1982) .....	1, 3
 <u>RULES, STATUTES, OTHERS</u>	
RAP 2.5(a) .....	1
U.S. CONST. amend. 4 .....	1
WASH. CONST. art. 1, sec. 7 .....	1

A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE KEAL'S ARREST WAS UNLAWFUL WHERE THE OFFICERS MADE A WARRANTLESS, NONCONSENSUAL ENTRY INTO A RESIDENCE TO EFFECTUATE 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.

The State argues that because Keal did not raise the issue of an unlawful arrest below, "this court cannot consider it now for the first time on appeal." Brief of Respondent at 10. To the contrary, the violation of Keal's rights under the Fourth Amendment and Article 1, section 7 constitutes a manifest error affecting a constitutional right which can be reviewed by this Court under RAP 2.5(a).

The State argues further that Deputy Fries lawfully pursued Keal into his wife's house because the deputy had arrested Keal and he was "actively fleeing and resisting." Brief of Respondent at 11-12. The State mistakenly relies on United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976); Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); and Washington v. Chrisman, 455 U.S. 1, 102 S. Ct. 812, 70 L. Ed. 2d 1087 (1982), which are clearly distinguishable from this case.

In United States v. Santana, undercover narcotics officer Michael Gilletti arranged a heroin buy with Patricia McCafferty. 427 U.S. at 39.

Gilletti met McCafferty at a prearranged location and drove her to Dominga Santana's house where he gave McCafferty marked bills and she went into the house and returned with envelopes containing heroin. Gilletti arrested McCafferty and she told him that Santana had the money he gave her for the heroin. Gilletti transported McCafferty to the police station and sent other officers to Santana's house. Id. at 39-40. As the officers approached the house, they saw Santana standing in the doorway holding a brown paper bag. The officers pulled up in front of the house, got out of the van, and identified themselves as police. Santana retreated into the vestibule of her house but the officers caught up to her and as she tried to pull away, two packets of heroin fell out of the paper bag and she had the marked money in her pockets. Id. at 40-41.

The Supreme Court concluded that the officers made a lawful warrantless arrest initiated in a public place because the case involved a hot pursuit and a heightened need for the officers to act quickly. The Court determined that "[o]nce Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence" and consequently Santana could not thwart the arrest by retreating into her house. Id. at 42-43.

In Warden v. Hayden, witnesses notified police that an armed robber escaped to a house at 2111 Cocoa Lane. Officers arrived at the

house and knocked and announced their presence. Mrs. Hayden answered the door and let them in when they asked to search the house for a robber. 387 U.S. at 297. The officers found Hayden in a bedroom feigning sleep and arrested him. The officers also seized weapons and clothing matching the description of the fleeing suspect's apparel. *Id.* at 298.

The Supreme Court concluded that the warrantless entry into the house was valid because under the circumstances "the exigencies of the situation made that course imperative." The Court determined that the "Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential." *Id.* at 298-99.

In Washington v. Chrisman, an officer saw a student leaving a dormitory carrying a half-gallon of gin. The student appeared to be under the drinking age so the officer stopped the student and asked for his identification. When the student said his identification was in his dormitory room, the officer told the student he had to accompany him to his room and the student replied, "O.K." Upon arriving at the room, the officer remained in the open doorway, leaning against the doorjamb. 455 U.S. at 3. While watching the student, the officer noticed seeds and a pipe lying on a desk, which he believed was marijuana and a smoking pipe. The officer entered the room and examined the seeds and pipe, confirming

that the seeds were marijuana and detecting that the pipe smelled of marijuana. Id. at 4.

The Supreme Court concluded that the plain view exception to the Fourth Amendment warrant requirement permits an officer to seize contraband when it is discovered in a place where the officer had a right to be. The Court determined that because the officer had placed the student under lawful arrest, he had the authority to accompany him to his room for the purpose of obtaining identification and had “a right to remain literally at [the student’s] “elbow at all times.” Id. at 5-6.

Unlike in Santana, Warden, and Washington, the record substantiates that there was no hot pursuit, no danger to the officers or the public, no risk of destruction of evidence, no consent to entry of the home, and no reason for the officers’ failure to obtain a search warrant. No exigent circumstances existed because Keal was only suspected of criminal trespass which is a nonviolent crime, he was not armed, he posed no danger to anyone, he could not escape, and the deputy was not trying to preserve evidence or seize contraband in plain view. Consequently, the officers’ warrantless, nonconsensual entry into the Keals’ home to effectuate an arrest was unlawful. State v. Counts, 99 Wn.2d 54, 59-61, 659 P.2d 1087 (1983); State v. Le, 103 Wn. App. 354, 359, 12 P.3d 653 (2000). See Brief of Appellant at 11-16.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Keal's convictions for third degree assault and resisting arrest because affirming his convictions would allow overzealous officers to force their way into a home, disregarding their constitutional duty to present their evidence to a magistrate to obtain a search warrant when no exigent circumstances exist.

DATED this 26<sup>th</sup> day of March, 2010.

Respectfully submitted,

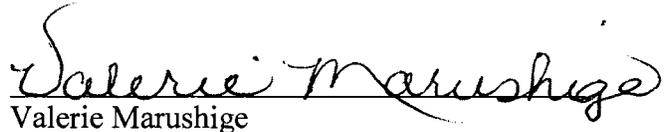
  
VALERIE MARUSHIGE  
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**DECLARATION OF SERVICE**

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 Melody Crick, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 26<sup>th</sup> day of March, 2010 in Kent, Washington.



Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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