

NO. 42397-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHERYL DANCER

Appellant.

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

The Honorable Anna M. Laurie, Judge

OPENING BRIEF OF APPELLANT

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Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence obtained during a warrantless search of her home.

2. The trial court erred when it entered conclusions of law VI and VII in its written CrR 3.6 findings and conclusions.¹

Issues Pertaining to Assignments of Error

1. While searching for a suspect in an assault case, police knocked on appellant's front door. Appellant denied the suspect was inside her home and indicated the direction in which she had seen him walking. Not willing to take appellant at her word, an officer asked for permission to conduct a search without first informing appellant she had the right to say no and insist on a search warrant. Appellant allowed the search. Although the suspect was not in her home, police did find methamphetamine, leading to appellant's conviction for possessing that substance. In the absence of notice that appellant could insist on a warrant, did the search of her home violate article 1, section 7 and the Fourth Amendment?

2. Did the trial court err when it concluded the absence of this notice was not fatal to appellant's consent to search and that the

motion to suppress should be denied?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County Prosecutor's Office charged Cheryl Dancer with one count of possessing methamphetamine. CP 1-6. Dancer moved to suppress all evidence of the methamphetamine, arguing it was the product of an unlawful warrantless search of her home in violation of state and federal constitutional protections. CP 7-57. Describing the issue as "a close call," the trial court denied the motion. 1RP² 92; CP 58-61.

Dancer waived her right to jury trial and submitted her case to the court on stipulated facts. CP 65-75. The court found Dancer guilty. 2RP 9; CP 62-64. She was sentenced to 240 hours of community service and timely filed her Notice of Appeal. CP 101, 111-135.

2. Substantive Facts

The only witness at the CrR 3.6 hearing was Bremerton Police Officer David Elton. 1RP 5. At 11:05 p.m. on the evening of June 19, 2011, Elton was dispatched to a 7-Eleven in response to a

¹ The court's findings and conclusions are attached to this brief as an appendix.

report of domestic violence. 1RP 10, 26. The victim reported that her boyfriend – Shawn Johnson – had assaulted her in the home they shared. 1RP 10-11, 29. The victim indicated that Johnson may have taken the couple's children to the home of their neighbor, Cheryl Dancer. 1RP 11.

Officers drove to the victim's home and searched for Johnson, who was not there. 1RP 11. A K-9 was brought to the scene and stayed in the immediate area of the two homes, which were about 20 feet apart, at times walking behind Dancer's residence. 1RP 11-12, 32. It was now after midnight, but some lights were on inside Dancer's home, and Officer Elton decided to contact her. 1RP 12, 21-22.

Elton knocked on the front door and Dancer answered. He then stood on the porch and talked to her while she remained in her doorway. 1RP 12. Dancer confirmed that the victim's children were safely inside her home. 1RP 13. She also informed Elton that Johnson was not inside her home; she had seen him walking away from the area and pointed out his direction of travel to Officer Elton. 1RP 13, 32.

² This brief refers to the verbatim report of proceedings as follows: 1RP – May 16, 2011; 2RP – June 6, 2011; 3RP – July 22, 2011.

Elton did not know the nature and extent of Dancer and Johnson's relationship and – despite her statement that he was not in the house – whether she might be lying. Therefore, he asked Dancer for consent to search her home for Johnson. 1RP 14, 33-34, 37-38. Elton did not provide Miranda³ or Ferrier⁴ warnings, believing the latter were not necessary because he sought to search the home for evidence of a person. 1RP 19-20, 28.

Dancer gave Elton permission to come inside and search. 1RP 15, 29. Elton looked in the rooms inside the home and anywhere else a person might hide, including closets. 1RP 15, 34. When Elton came upon a room that was locked from the outside, he asked to look inside and Dancer unlocked the door. 1RP 16, 34-35. Elton spotted a meth pipe and baggies of the drug, which he confiscated. Dancer admitted ownership of the items and that this was her bedroom. 1RP 17-18, 35.

As Dancer had said, Johnson was not hiding inside her home. He was subsequently arrested after police found him hiding in another home at a different location. 1RP 31-32.

Defense counsel argued that whether officers were seeking

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to search a home for evidence of a crime or evidence of a criminal, Ferrier requires officers to advise homeowners they need not consent to a search in the absence of a warrant. 1RP 44-70, 80-81. The State, however, argued that such warnings are not required when officers seek permission to search for evidence of a person. 1RP 70-80.

In denying the defense motion, the trial court entered findings of fact that accurately summarize Officer Elton's testimony. See CP 58-60. The court concluded that the necessity of Ferrier warnings is not limited to a "knock and talk" investigation. The court also concluded that no court had ever addressed whether Ferrier warnings must be given prior to a warrantless search for an individual. Ultimately, however, the court found the absence of these warnings is not fatal to consent to search a home where officers have probable cause to arrest a suspect and enter the home to search for that suspect. See CP 60-61.

Dancer now appeals.

⁴ State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

C. ARGUMENT

THE WARRANTLESS SEARCH OF DANCER'S HOME VIOLATED HER RIGHTS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . ." Article I, section 7 of the Washington Constitution provides, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Moreover, "[t]his constitutional protection is at its apex 'where invasion of a person's home is involved.'" State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008) (quoting City of Pasco v. Shaw, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), cert. denied, 552 U.S. 1275 (2008)).

Warrantless searches are unreasonable per se subject to narrow and carefully drawn exceptions. Consent is one such

exception, and the State bears the difficult burden of proving its presence. State v. Hendrickson, 129 Wn.2d 61, 70-72, 917 P.2d 563 (1996). This Court reviews “conclusions of law in an order pertaining to suppression of evidence de novo.” State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

In State v. Ferrier, the Supreme Court of Washington examined the Bremerton Police Department’s practice of conducting a “knock and talk” to obtain consent to warrantless home searches. Ferrier, 136 Wn.2d at 106. Bremerton officers found that in most cases, where they had information suggesting they should search a home (but no warrant to do so), occupants would provide consent to search if officers simply knocked on the door, explained why they were there, and requested permission to search. Id. at 107.

In Ferrier’s case, Bremerton officers received information she had a marijuana grow operation. Id. at 106. Officers contacted Ferrier at her home, explained their suspicions, and requested permission to search. At no time did any officer explain to Ferrier her right to refuse and insist on a warrant. Ferrier gave permission to search and, in a locked bedroom, officers found the operation. Id. at

107-109.

The Supreme Court found that Ferrier's consent was obtained in violation of article 1, section 7. Significant to the Court's finding was that Ferrier was in her home when contacted, police sought her consent in order to dispense with the necessity of obtaining a warrant, and – most importantly – officers never informed Ferrier she could refuse. Id. at 115. Central to the Court's holding was the inherently coercive nature of the interaction:

we believe that the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search. . . .

Id. at 115.

Citing the heightened constitutional protections in the home, the Ferrier Court stated, "we are satisfied that public policy supports adoption of a rule that article 1, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search." Id. at 118. Therefore, when officers perform a knock and talk for the purpose of searching a home, they

must first inform the person with whom they are speaking that he or she may lawfully refuse, may limit the scope of the consent, and may revoke the consent at any time.⁵ Failure to do so prior to entry vitiates any subsequent consent.⁶ Id.

In decisions subsequent to Ferrier, the Supreme Court made clear that the above warnings are only mandated in "situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search" State v. Khounvichai, 149 Wn.2d 557, 563, 69 P.3d 862 (2003). The Court found "a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes." Id. at 564.

Thus, for example, in Khounvichai, no Ferrier warnings were necessary where officers merely went to the home to speak to a resident. The resident's mother answered the door, confirmed he was home, and invited officers inside. At no time did officers seek to

⁵ Had Dancer received these warnings, not only would she have had the information necessary to decide whether to grant consent at the outset, she also would have had the information necessary to decide whether she should limit or terminate that consent. This information would have been particularly useful when Officer Elton asked for entry to the locked bedroom.

⁶ The Court noted that while the absence of such warnings is dispositive under article I, section 7, it is merely one factor to consider in assessing voluntariness under the more permissive standard of the Fourth Amendment. Id. at 110, 118.

search the home. Khounvichai, 149 Wn.2d at 559-560, 564-567. In State v. Williams, 142 Wn.2d 17, 27-28, 11 P.3d 714 (2000), no warnings were required where police merely requested consent to enter so that they could arrest a visitor for whom they had an arrest warrant. Officers did not seek to search the home for evidence of a crime or an individual. And, in State v. Bustamante-Davila, 138 Wn.2d 964, 967-970, 980-981, 983 P.2d 590 (1999), no warnings were necessary where officers sought entry to defendant's home merely to serve a deportation order because, again, officers did not seek to search the home.

In Dancer's case, the State successfully convinced the trial court to draw a distinction between warrantless searches of homes for physical evidence and warrantless searches for individuals suspected of criminal activity. See CP 60-61 (conclusion VI: finding lack of Ferrier warnings not fatal because officers at Dancer's home "looking just for the suspect.").

There is no such distinction under the more limited protections of the Fourth Amendment. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be

crossed without a warrant.” Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (emphasis added); see also id. at 588 (“an entry to arrest and an entry to search for and seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.”).

There is no valid reason to draw such a distinction under the greater protections of article I, section 7, either. The same considerations requiring warnings in Ferrier are present whether police seek a warrantless entry to look for physical evidence or evidence of an individual suspected of criminal activity. As in Ferrier, Dancer was contacted in her home, police sought her consent in order to dispense with the necessity of obtaining a warrant, and – most importantly – officers never informed Dancer she could refuse. Id. at 115.

Dancer unequivocally told Officer Elton that Johnson was not inside her home, yet Elton still asked to search her home. This situation is no less “inherently coercive” than that in Ferrier. Dancer was no better equipped than Ferrier to (1) know that a warrant is required; (2) feel comfortable requesting its production, even if she knew of the warrant requirement; or (3) make a reasoned decision

about whether to consent.

Division Three's opinion in State v. Freepons, 147 Wn. App. 689, 197 P.3d 682 (2008), supports Dancer's position that there is no distinction under article I, section 7 between warrantless searches for physical evidence and warrantless searches for suspects. In Freepons, officers came upon a one-car accident and located 19-year-old Adam Byrne nearby. Byrne smelled of alcohol and denied driving the car, suggesting his brother Bryan may have been the driver. Adam identified for police the home where he and his brother had attended a party hours earlier. Freepons, 147 Wn. App. at 691.

Deputies went to the home and two individuals, one of whom was Freepons, answered the door. A deputy informed them that there had been a car accident and that they were looking for Bryan Byrne. Id. at 694. Deputies were told Bryan was not there, but the two agreed to allow deputies in the house to look for him. Once inside, the deputies discovered a marijuana grow operation, leading to felony charges for the two men. Id.

On appeal, a majority of the Division Three panel found that because deputies' purpose in trying to find Bryan Byrne was related to their criminal investigation involving the car accident, deputies were searching for evidence of a crime and required to provide the

men with Ferrier warnings before seeking consent to search the home. The failure to do so required reversal. Id. at 694-695.

Judge Brown dissented, arguing no warnings were necessary because officers did not seek entry into the home to search for evidence of crimes involving the appellants and that there was insufficient time to obtain a warrant. Id. at 695-696 (Brown, J., dissenting). The Supreme Court apparently agreed with the majority, as it denied a State's petition for review. See State v. Freepons, 166 Wn.2d 1008, 208 P.3d 1124 (2009).

As in Freepons, Officer Elton's purpose in trying to find Shawn Johnson was related to the criminal investigation involving the assault of his girlfriend. Because Elton was searching for evidence of a crime (the perpetrator), he was required to provide Dancer with Ferrier warnings before seeking consent to search her home.

This Court should hold that whether officers seek permission to conduct a warrantless search of a home for physical evidence or a warrantless search for evidence of a suspect, consent obtained in the absence of Ferrier warnings violates article I, section 7.

Even assuming, however, that Officer Elton's failure to inform Dancer of her right to refuse the warrantless search does not, by itself, invalidate the search under article I, section 7, the State cannot

demonstrate a valid consent.

Under the Fourth Amendment, it is the State's burden to demonstrate, under the totality of the circumstances, a valid consent by clear and convincing evidence. Bustamante-Davila, 138 Wn.2d at 981; Ferrier, 136 Wn.2d at 116. Those circumstances include "(1) whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent." State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975)).

The trial court never analyzed the totality of the circumstances. But it cannot be disputed that Officer Elton never provided Dancer with Miranda warnings. See CP 59 (finding V: "Law enforcement never read the Defendant Miranda warnings"). It also cannot be disputed that Elton never ascertained Dancer's education or intelligence. See CP 59 (finding V: "Law enforcement never ascertained the Defendant's level of education nor whether she could read or write."). And, finally, it cannot be disputed that Elton never advised Dancer of her right to refuse consent. See CP 59 (finding V: no Ferrier warnings). Under the totality of circumstances, the State did not demonstrate a voluntary consent.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). That is the remedy here. All evidence of methamphetamine found in the warrantless search of Dancer's home should have been suppressed.

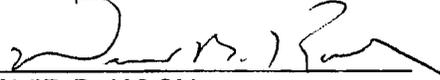
D. CONCLUSION

Dancer respectfully asks this Court to find a violation of article I, section 7 and the Fourth Amendment and reverse her conviction.

DATED this 30th day of November, 2011.

Respectfully submitted,

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Attorneys for Appellant

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IN THE KITSAP COUNTY SUPERIOR COURT

7	STATE OF WASHINGTON,)	
8)	No. 11-1-00031-0
9	Plaintiff,)	
10	v.)	FINDINGS OF FACT AND CONCLUSIONS
11)	OF LAW FOR HEARING ON CrR 3.6
12	CHERYL EVON DANCER,)	
13	Age: 47; DOB: 03/10/1964,)	
14	Defendant.)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.6; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following-

FINDINGS OF FACT

I.

That on January 20, 2010 there was a victim at the 7-Eleven in Bremerton, Washington that had been assaulted by her boyfriend. She had a visible black eye and told law enforcement that her children were either still in her home with the boyfriend or were at the neighbor's home next door.

II.

That law enforcement went to the victim's home and found neither the children nor the suspect at the home. Law enforcement then went next door to the neighbor's home where the children presumably were. The Defendant was a resident of this home.



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III.

That there was a canine search conducted for the suspect which also led law enforcement to the rear of Defendant's home. Members of law enforcement went to the Defendant's home for three reasons including the canine track, the fact that the victim's children were there and because they were in the process of gathering information regarding the assault, including locating the suspect.

IV.

That upon arrival at the Defendant's home, the Defendant came outside the home and told law enforcement that the suspect was not at the home but that she had last seen him walking down the street away from the area. She told him the children were inside and that she was aware of the assault that had taken place for that was the reason why the children were at her residence.

V.

That law enforcement asked if they could come in the Defendant's home and look for the suspect. Law enforcement never read the Defendant Miranda warnings nor Ferrier warnings. Law enforcement never ascertained the Defendant's level of education nor whether she could read or write. The Defendant consented to this entry of law enforcement.

VI.

That the officer went in the home and searched it room to room. They did not conduct a search of anyplace where a person could not be and it was clear their focus was the search for the suspect.

VII.

That the officer and the Defendant came to a room which was locked from the outside. The Defendant told the officer that the room was her bedroom. The officer asked her if she would unlock it so he could look inside for the suspect. The Defendant gave consent to search that room and unlocked it. The officer and the Defendant went inside the room and immediately evident was the glass meth pipe and the baggies of suspected methamphetamine.

VIII.

That law enforcement did not arrest the Defendant at the time. This was because she was not the focus of the search and she was highly cooperative throughout their encounter.



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IX.

That law enforcement was actively investigating the domestic violence assault when it searched the Defendant's home and resolved the investigation a day or two after their encounter with the Defendant.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That whether this was a "knock and talk" is not dispositive in this case. However, the Court finds that it was not a "knock and talk".

III.

That the question of whether the search for a suspect is a search requiring *Ferrier* warnings has never been answered by the appellate courts and thus this Court is relying on the general principals enunciated by the Supreme Court in *State v. Khounvichai*.¹

IV.

That it is not law enforcement's subjective intent that governs whether *Ferrier* warnings are required. Instead the determination must be made on a case-by-case basis.

V.

That *State v. Freepons* is not on point with the case before this Court as the facts are significantly different.² In *Freepons*, law enforcement was not only looking for a suspect, but they were requesting to search the defendant's home to look for evidence of crimes committed by the defendants in that case. In the instant case law enforcement only went into the home to search for the suspect.

VI.

That law enforcement was at the Defendant's home with probable cause to arrest a suspect and were at the home looking just for the suspect. The lack of *Ferrier* warnings is not

¹ *State v Ferrier*, 136 Wn. 2d 103, 960 P.2d 927 (1998). *State v. Khounvichai*, 149 Wn. 2d 557, 69 P.3d 862 (2003).

² 147 Was. App. 689, 197 P.3d 682 (2008).



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fatal to the consent that was given by the Defendant.

VII.

That the Defendant's CrR 3.6 Motion to Suppress and Dismiss is denied.

SO ORDERED this 6th day of ~~May~~^{June}, 2011.

[Handwritten Signature]

JUDGE

PRESENTED BY--

COPY RECEIVED--

STATE OF WASHINGTON

[Handwritten Signature]
ALEXIS T. FOSTER, WSBA No. 37032
Deputy Prosecuting Attorney

[Handwritten Signature]
Steve M. Lewis, WSBA No. 35496
Attorney for Defendant

Prosecutor's File Number--10-120096-6



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 42397-9-II
)	
CHERYL DANCER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHERYL DANCER
C/O CRYSTAL SCHROEDER
4232 O STREET
BREMERTON, WA 98312

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 30, 2011 - 3:15 PM

Transmittal Letter

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Case Name: Cheryl Dancer

Court of Appeals Case Number: 42397-9

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- Statement of Arrangements
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- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
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