

NO. 42777-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINE KAY WESTVANG,

Appellant.

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

The Honorable James Stonier, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. REQUEST FOR SUPPLEMENTAL BRIEFING

On May 21, 2013, this Court issued a published decision reversing Christine Westvang's conviction. On February 5, 2014, the Washington State Supreme Court granted the State's petition for review remanding for reconsideration in light of its decision in State v. Ruem, 179 Wn.2d 195, 313 P.3d 1156 (2013). On February 27, 2014, this Court ordered supplemental briefing addressing the applicability of Ruem.

B. RESTATEMENT OF THE CASE

On March 31, 2011, law enforcement officers working as members of the Career Criminal Apprehension Team were conducting a fugitive sweep in Cowlitz County, seeking to execute an arrest warrant for Scott Miller. RP 2-3. During their investigation they were given information that he was frequently at an address on Baltimore Street in Longview. RP 3-4, 16. The team headed to that address to search for Miller. RP 4.

Detective Kevin Sawyer walked to the corner of the house, while Detective Spencer Harris approached a sliding glass door. RP 5. Two more officers covered the other side of the house. RP 5, 17. Peeking through the window covering, Harris saw Christine Westvang sitting at a desk. He knocked on the door, and Westvang walked over and opened it. RP 5. Sawyer then joined them at the door. Both Sawyer and Harris were clearly identified as police officers. RP 5-6.

The officers told Westvang they were looking for Miller, and Westvang said he was not there. RP 18. Because Westvang seemed nervous, the officers did not believe her and thought she might be hiding Miller. RP 6. They said they had information that Miller was there, and they wanted to search her house. RP 6-7, 18. Sawyer told Westvang she did not have to consent to a search, but she told them Miller was not there and agreed to let them in. RP 7, 18. Neither officer told Westvang she could end the search at any time or that she could limit it to certain areas of the house. RP 11, 18-19.

Once inside, Westvang led the officers through the rooms in the back of the house, and they saw that Miller was not there. RP 8, 20. When they returned to the living room, Harris walked over to the desk where Westvang had been sitting when they arrived, thinking the desk area was big enough to hide a person. RP 9. On top of the desk he saw a scale, plastic baggies, and a tin containing a substance later identified as methamphetamine. RP 9, 21. Sawyer read Westvang her Miranda warnings, questioned her about the evidence they found, and placed her under arrest. RP 23-25.

Prior to trial Westvang moved to suppress the evidence seized during the search of her home. CP 3-5. The court found that Westvang

had consented to the officers' entry and search of her home. It denied the motion to suppress evidence. RP 54-55.

C. ARGUMENT

THE FAILURE TO GIVE FERRIER WARNINGS BEFORE SEEKING CONSENT TO SEARCH WESTVANG'S HOME DURING A KNOCK AND TALK VITIATES ANY CONSENT GIVEN.

Both the state and federal constitutions protect individuals against unreasonable searches and seizures. Const. art. 1 § 7; U.S. Const., amend. IV. 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, 128 S.Ct. 1651, 170 L.Ed.2d 385 (2008)).

A warrantless search is presumed unreasonable, and exceptions to the warrant requirement are limited and carefully drawn. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). Constitutionally valid consent is a recognized exception to warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

In Ferrier, the Supreme Court examined the police practice known as a knock and talk, in which law enforcement officers conducting an

investigation seek consent to search a home without a warrant. Ferrier, 136 Wn.2d at 107. The Supreme Court found this procedure inherently coercive and adopted the following rule:

that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Ferrier, 136 Wn.2d at 118-19.

In subsequent cases the Supreme Court made clear that the Ferrier rule only applies when police seek entry into a home to conduct a warrantless search. State v. Khounvichai, 149 Wn.2d 557, 563, 69 P.3d 862 (2003); State v. Williams, 142 Wn.2d 17, 28, 11 P.3d 714 (2000); State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). 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.” Khounvichai, 149 Wn.2d at 564. “[T]he Ferrier warnings target searches and not merely contacts between the police and individuals.” Id.

In Ruem, the Supreme Court again addressed the limitations of Ferrier. In that case, sheriff’s deputies sought to arrest Chantha Ruem on

an arrest warrant. They had a reasonable suspicion that he was living in a mobile home on his father's property, but their information did not establish probable cause to believe he was there. Ruem, 179 Wn.2d at 202. A team of deputies went to the mobile home in an attempt to serve the arrest warrant. When they knocked on the door, Chantha's brother Dara Ruem answered and said Chantha was not there. The deputies asked to come in and look for Chantha. Ruem agreed, but almost immediately changed his mind. The deputies nonetheless entered the mobile home, where they discovered controlled substances. Ruem, 179 Wn.2d at 198-99.

The Supreme Court first held that the arrest warrant did not justify the warrantless entry into the home, because the deputies did not have probable cause to believe Chantha lived there and was present at the time of the entry. Ruem, 179 Wn.2d at 201-04. Next the court considered whether the deputies' failure to provide Ferrier warnings rendered Ruem's consent invalid. Id. at 204.

The Court noted that in Ferrier it held that a knock and talk procedure is inherently coercive, and law enforcement officers must inform the occupant of the right to refuse consent to a search before entering the home. Id. at 205 (citing Ferrier, 136 Wn.2d at 115-16). The Court then discussed the subsequent limitations on Ferrier recognized in

Bustamante-Davila, 138 Wn.2d AT 981 (defendant need not be advised of right to refuse entry where officers do not seek to search the home); Williams, 142 Wn.2d at 28 (Ferrier warnings not needed where homeowner granted law enforcement access to home to verify identity of guests); State v. Vy Thang, 145 Wn.2d 630, 635–37, 41 P.3d 1159 (2002) (Ferrier warnings not needed where police entered home to serve arrest warrants); and Khounvichai, 149 Wn.2d at 563 (Ferrier warnings required only when police seek entry to conduct consensual search for contraband or evidence of crime).

Applying that law to the case, the Court found that the deputies had not sought consent to circumvent the warrant process. The mobile home was of interest to them because they had reasonable suspicion Chantha lived there and they had a warrant for his arrest. The deputies did not seek entry to conduct a consensual search for contraband or evidence, thus this was not a knock and talk procedure, and no Ferrier warnings were required. Ruem, 179 Wn.2d at 206. The Court nonetheless reversed, holding that because Ruem had withdrawn his consent, the entry was unlawful and the evidence should have been suppressed. Ruem, 179 Wn.2d at 207.

Unlike the contact in Ruem, the procedure used by law enforcement in this case was a knock and talk, and the police were

required to inform Westvang of her right to refuse, withdraw, or limit consent for the search. In Ruem, the deputies had reasonable suspicion that the person for whom they had an arrest warrant lived and would be found in the mobile home, and that fact changed the nature of the encounter. Ruem, 179 Wn.2d at 206. That was not the case here. The police were not acting on reasonable suspicion that Miller lived at Westvang's home or even that he would be found there.

Without reasonable suspicion to believe the subject of the arrest warrant is present, the request to enter and search is substantively indistinguishable from the procedure used in Ferrier. Whether the request to search is made “on [the] doorstep or in [the] home,” the coercive nature of contact the same:

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 productions, 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.

Ferrier, 136 Wn.2d at 115; see also Ruem, 179 Wn.2d at 205 (noting that in Ferrier police “knocked on [Ferrier’s] door and asked permission to search the home for marijuana plants but did not tell Ferrier that she had a right to refuse consent.... We held that under article I, section 7, such a

‘knock and talk’ procedure is inherently coercive....”). Because the police were not seeking to verify the identity of those present in the home, or seeking to arrest someone they reasonably believed to be present, but were instead seeking to “arbitrarily search a home for a hidden guest,” the procedure employed here constitutes a knock and talk as described in Ferrier. See Williams, 142 Wn.2d at 27. As Ruem acknowledged, Ferrier warnings are required when police conduct a knock and talk. Ruem, 179 Wn.2d at 206.

The failure to give Ferrier warnings in this case vitiates any consent Westvang gave, and evidence seized during the warrantless search should have been suppressed. This Court’s decision reversing Westvang’s conviction is in line with Ruem and should be upheld.

D. CONCLUSION

This Court properly reversed Westvang’s conviction, and that decision should be upheld.

DATED this 28th day of March, 2014.

Respectfully submitted,



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Certification of Service

Today I forwarded a copy of the Supplemental Brief of Appellant
in *State v. Christine K. Westvang*, Cause No. 42777-0-II to:

Christine Westvang
5830 Happy Hollow Road
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is written in a cursive style with a long horizontal flourish at the end.

Catherine E. Glinski
Done in Port Orchard, WA
March 28, 2014

GLINSKI LAW OFFICE

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