

NO. 42777-0-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTINE KAY WESTVANG,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. PROCEDURAL HISTORY

This court reversed Christine Westvang's conviction in *State v. Westvang*, 174 Wn.App 913, 301 P.3d 64 (2013). Following that published decision, the State petitioned the Washington State Supreme Court for review. The Supreme Court granted review and then remanded to this court to reconsider *State v. Westvang* in light of the Supreme Court's subsequent 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, Officer Spencer Harris and Detective Kevin Sawyer were part of a team conducting a fugitive sweep, and in particular they were seeking to locate Scott Miller and execute an arrest warrant for him. RP 3, 16; CP 66 (Findings of Fact #1). A citizen gave the officers an address, 1345 Baltimore Street #1 in Longview, that Mr. Miller frequented and where he may have been located. RP 3-4, 16; CP 66 (FF #2). The officers proceeded to that address, with Officer Harris and Detective Sawyer knocking on the door and contacting Ms. Westvang when she

answered it. RP 4-5, 16-17; CP 66 (FF #3). Meanwhile, the other officers waited outside the home, including at least one officer positioned at the other side of the home in case someone was to run. RP 5, 16-17, 41.

Officer Harris and Detective Sawyer explained to Ms. Westvang that they were at her home because they received information that Mr. Miller may be there. RP 6, 17-18; CP 66 (FF #4). Ms. Westvang denied that Mr. Miller was in her home. RP 6, 18; (FF #4). Officer Harris again explained to Ms. Westvang that they had information that Mr. Miller was in the home and noticed that Ms. Westvang was nervous. RP 6. Based on her nervousness, Officer Harris believed that Ms. Westvang was not being truthful and that she may have been hiding Mr. Miller in the home. RP 6. Officer Harris testified that this happens all the time. RP 6.

As a result, the officers asked if they could enter her home to look for Mr. Miller, and informed her that they would be in and out in a few minutes and that she did not have to let them into her home. RP 6-7, 18; CP 67 (FF #5). Ms. Westvang, after again stating that Mr. Miller was not in her home, consented to the officers' entry and began showing them around the house. RP 7-8, 18-20; CP 67 (FF #5, #6). The officers followed Ms. Westvang down a hallway and checked each of the rooms

she pointed out before walking back to the living room area. RP 8, 20. The officers described Ms. Westvang as cooperative. RP 7, 19.

Upon returning the living room, Officer Harris noticed a desk that was big enough for someone to hide behind. RP 9, 20; CP 67 (FF #7). Consequently, he walked over to it to make sure Mr. Miller was not hiding there. RP 9, 20. At that point, Officer Harris noticed plastic baggies, functional scales, paraphernalia for smoking, crystal, which was believed to be and later confirmed to be methamphetamine, and marijuana. RP 9-10, 21; CP 67 (FF #7, #8). Consequently, Detective Sawyer read Ms. Westvang her Miranda warnings, questioned her, and after she confessed that the contraband was hers, placed her under arrest. RP 10, 22-25; CP 67 (FF #9).

C. ARGUMENT

OFFICERS WERE SEEKING TO ENTER MS. WESTVANG'S HOME PURSUANT TO A LEGITIMATE INVESTGATORY PURPOSE AND, AS A RESULT, WERE NOT REQUIRED TO PROVIDE HER FERRIER WARNINGS WHEN OBTAINING HER CONSENT TO ENTER.

In *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003) our Supreme Court “reiterate[d] that [*Ferrier*] warnings are required *only*

when police officers seek entry to conduct a consensual search for contraband or evidence of a crime.” (emphasis added). Nonetheless, this court in its original decision starkly stated “that the spreading belief that *Ferrier* warnings are required only when officers seek to enter a home to search for contraband or evidence of a crime and not for a person is incorrect.” *Westvang*, 174 Wn.App at 927. In *State v. Reum*, our Supreme Court recently confirmed the above holding of *Khounvichai* and made clear that “*Ferrier* warnings are not required when law enforcement officers seek consent to enter a home to execute an arrest warrant.” 179 Wn.2d at 204-06, 210. Consequently, the holding of the Court of Appeals in this case that officers are required to “give *Ferrier* warnings before obtaining a resident’s consent to search a home for a person unless the search is supported by a reasonable suspicion that the person may be found in the home” is at odds with *Ruem* and our Supreme Court’s *Ferrier* jurisprudence and should be reversed. *Westvang*, 174 Wn.App at 915.

In *Ruem*, deputies attempted to serve an arrest warrant for Chantha Ruem at his brother Dara Ruem’s (hereinafter “Ruem”) mobile home. 179 Wn.2d at 197. Because deputies lacked probable cause to believe Chantha was present at the time, and Ruem revoked his initial consent allowing the

deputies to enter, the evidence later discovered was unlawfully obtained and admitted at trial. *Id.* At the time the deputies attempted to serve the arrest warrant the only information they had that seemed to indicate that Chantha might be present at Ruem's residence was that a car registered to him was parked on the property. *Id.* at 198, 204. In contrast,

it had been several months since Chantha's father told the deputies Chantha lived there. Additionally, deputies had reports from two people that Chantha had moved to California, and the only independent witness interviewed did not even know who Chantha was. Deputies here never encountered Chantha on the property. [The deputies] both testified that they had no way of knowing the last time Chantha was at the address.

Id. at 203 (citations omitted).

Moreover, in reference to the car registered to Chantha, the deputies knew "Chantha's girlfriend lived at the property and drove the car, and they were told by family members that Chantha left the car behind when he moved to California and bought another car. Deputies never encountered Chantha on the days that his car was at the address, and they observed his girlfriend driving the car." *Id.* at 204 (citations omitted). Consequently, *Ruem* held that the deputies lacked probable cause, i.e., "information that would convince a reasonably cautious person that

Chantha was . . . present at the home on the evening in question.” *Id.* at 203. Next, the court considered whether the absence of *Ferrier* warnings rendered Ruem’s consent invalid.

Under the above facts, *Ruem* held that *Ferrier* warnings were not needed because deputies did not conduct a “knock and talk,” that is, they “did not seek Ruem’s consent in order to circumvent the requirements of the search warrant process.” 179 Wn.2d at 206 (emphasis added)¹. Simply put, *Ruem* held “*Ferrier* warnings are not required when law enforcement officers seek consent to enter a home to execute an arrest warrant.” *Id.* at 210 (emphasis added). The home was only of interest to the deputies because they believed Chantha was there and they had a warrant for his arrest; thus, “[t]he deputies did not ‘seek entry to conduct a consensual search for contraband or evidence of a crime.’” *Id.* (quoting *Khounvichai*, 149 Wn.2d at 559). This case, like *Ruem*, is readily

¹ The lead opinion provides the *Ferrier* holding as 5 justices joined that section of the opinion. *Ruem*, 179 Wn.2d at 221 (J.M. Johnson, J., concurring in part, dissenting in part) (“I concur in the lead opinion’s *Ferrier* holding, and the rule in this case remains that law enforcement officers’ failure to inform one resident of a home about the right to refuse consent to execute an arrest warrant does not render that consent per se invalid.”); *In re Francis*, 170 Wn.2d 517, 532 FN. 7, 242 P.3d 866 (2010) (“When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed.”).

distinguishable from *Ferrier* “because in that case the police were attempting to circumvent the warrant requirement specifically because ‘they believed that they could not obtain a search warrant.’” *Id.* at 219-220 (J.M. Johnson, J., concurring in part, dissenting in part) (quoting *State v. Ferrier*, 136 Wn.2d, 103, 107, 960 P.2d 927(1998) (emphasis added).

Ruem did not hold that a certain quantum of proof—that the person the police were looking for was present in a home—must be established prior to asking for consent from the homeowner, and failing that, that *Ferrier* warnings must be given in order to enter and look for the person. Given the almost complete lack of information that Chantha was present at the residence coupled with the substantial evidence that he was not present, *Ruem* would have been the perfect vehicle for our Supreme Court to announce a rule like the one announced by this court in the original opinion. Instead, *Ruem’s Ferrier* analysis focused on the *purpose* for which the deputies sought to enter Ruem’s home, not whether they had reasonable suspicion or some other quantum of proof to believe he was present at the time they sought consent. Because the purpose controls the result *Ruem* concluded that “*Ferrier* warnings are not required when law

enforcement officers seek consent to enter a home to execute an arrest warrant.” 179 Wn.2d at 210.

Here, that the officers sought consent to enter Ms. Westvang’s home to execute an arrest warrant is indisputable. Consequently, *Ferrier* warnings were not required, this court’s decision should be reversed, and the trial court’s decision affirmed.

D. CONCLUSION

For the reasons argued above this court should reverse its previous decision and affirm Ms. Westvang’s conviction.

Respectfully submitted this 31th day of March, 2014.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 31st, 2014.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 31, 2014 - 1:43 PM

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