

No. 42785-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Samuel Fairbanks,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00044-1

The Honorable Judge Jeanette Dalton

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Fairbanks's motion to suppress.
2. The police violated Mr. Fairbanks's right to privacy under Wash. Const. Article I, Section 7 by searching his house without a warrant and in the absence of valid consent.
3. The police violated Mr. Fairbanks's right to privacy under Wash. Const. Article I, Section 7 by exceeding implied limitations on the scope of Mr. Fairbanks's consent.
4. The trial court erred by adopting Finding of Fact No. xxxiv.
5. The trial court erred by adopting Finding of Fact No. xxxv.
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7. The trial court erred by adopting Finding of Fact No. xlv.
8. The trial court erred by adopting Finding of Fact No. xlix.
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21. The trial court erred by adopting Conclusion of Law No. XI.
22. The trial court erred by adopting Conclusion of Law No. XII.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Police may not conduct a warrantless residential search absent an exception to the warrant requirement. In this case, police searched Mr. Fairbanks's residence without a warrant, and the prosecution failed to prove that Mr. Fairbanks had freely and voluntarily consented. Did the police violate Mr. Fairbanks's right to privacy under Article I, Section 7?

2. Police conducting a warrantless consent search of a residence may not exceed any implied limitations on the scope of the homeowner's consent. Here, Mr. Fairbanks's consent allowed police to search his residence, subject to an implied limitation that they would look for a marijuana grow operation. By exceeding the scope of this implied limitation, did the police violate Mr. Fairbanks's right to privacy under Article I, Section 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Before October of 2010, Samuel Fairbanks's residence had been searched twice by police. CP 11, 18; RP 127. Both times, the police had a search warrant. RP 69, 97, 127. One time they searched when no one was home. RP 95. The other time, the searching officers did not respond to Mr. Fairbanks's wife's attempt to resist or limit the search. Mr. Fairbanks was not provided a copy of the search warrant until after each search was completed. RP 127-128.

In October of 2010, police again wanted to search Mr. Fairbanks's home. Lacking probable cause, they planned a "knock and talk." RP¹ 5-8. Sgt. Vangesen brought another plainclothes officer with him, as well as at least three additional officers in uniform. RP 9, 11, 13, 51. Law enforcement vehicles arrived and parked in the single lane driveway, blocking the exit of any vehicle in the driveway or garage. RP 11, 53, 66. Mr. Fairbanks looked out the window and saw multiple police cars. RP 86-88, 90-91.

Officers knocked on the door, identified themselves, and—through the door—told Mr. Banks to secure his dog, which they could hear

¹ The only volume from the Verbatim Report of Proceedings cited in this brief is from August 2, 2011.

barking. RP 13-14, 54, 92. Once the dog was in a closed room, Mr. Fairbanks opened the door and spoke with the officers. They told him they'd heard a report that his residence smelled of marijuana. RP 14-16, 54. Mr. Fairbanks, who'd been previously convicted of growing marijuana in his garage, was eager to show the officers that he was no longer involved in such an operation. RP 15-16, 55, 75, 79, 109.

Vangesen had a form preprinted with *Ferrier* warnings and a waiver, made with blanks for a signature for consent. RP 58, Exhibit 1, Supp. CP. He did not show it to Mr. Fairbanks, and only read him the four mandatory *Ferrier* warnings from the form. RP 18, 56, 60. Because he worried that Mr. Fairbanks might not agree to sign and he therefore might not get consent for the search, he did not ask for a signature. RP 57.

Mr. Fairbanks believed the officers wanted to know if he still had a marijuana grow in his garage. RP 20, 61, 109, 129, 132. He showed the officers the garage, and they found there was no grow operation.² RP 20, 22, 100. They questioned Mr. Fairbanks about his own drug use, and he voluntarily produced a pipe and a small amount of marijuana. RP 22-24, 74, 100-101.

² It is for these reasons that error is assigned to Finding of Fact Nos. xxxv, xxxvii.

At least four officers and Mr. Fairbanks went into the house, and the officers searched it. RP 25-26, 27, 76, 101, 145. Vangesen found a scale with residue inside a dresser drawer, as well as a spoon with residue on a side table. RP 26. Mr. Fairbanks asked the officer about stopping the search. According to Mr. Fairbanks, he clearly told the officer s to stop the search. RP 104-105, 137-140. According to Vangesen, Mr. Fairbanks asked if he could stop the search at any time. RP 61. Vangesen continued to search, but told him that he could; there was no further conversation.³ RP 28, 104-105.

Mr. Fairbanks went into the bathroom and flushed the toilet.⁴ RP 26-27. The officer wanted Mr. Fairbanks’s continuing cooperation, and so—even after Mr. Fairbanks flushed the toilet—he still did not restrict Mr. Fairbanks’s movement until after Mr. Fairbanks had opened a small safe with a key. At that time, Vangesen directed Mr. Fairbanks to sit down in the living room while he continued to search the bedroom. RP 30-31, 62, 81, 108.

³ It is for these reasons that error is assigned to the court’s Findings Nos. xlix, l, and li.

⁴ Mr. Fairbanks said that he noted the toilet had not been flushed after its last use, but Vangesen alleged that there was an empty bag and that Mr. Fairbanks admitted that he had flushed marijuana. RP 29, 30, 112. This is the basis of the assignment of error to Finding. No. lvi.

After the search was done, one of the uniformed officers read Mr. Fairbanks his Miranda rights. RP 34. He was arrested, and charged with Possession of Methamphetamine. CP 1; RP 36.

Mr. Fairbanks moved to suppress the evidence, arguing that he did not validly consent to the search. In the alternative, he argued that any consent was limited in scope, and later withdrawn. Motion and Affidavit to Suppress, Memorandum of Authorities, Supp. CP.

At the evidentiary hearing, Mr. Fairbanks testified that he did not believe that the officers were genuinely asking for his consent. He also believed, given his experience and the show of force, that the officers already had a search warrant. RP 96-97, 98, 135-136. Mr. Fairbanks further testified that he believed, based on the statement of the officer at the door, that they were looking for a marijuana grow, and that they would only look until they realized there was no grow operation. RP 109-110. He testified that he was intimidated by the number of officers present and by the fact that Vangersen had ignored his request to stop the search. He was afraid and did not believe he was free to leave, or to stop or limit the search.⁵ RP 113-115.

⁵ It is for these reasons that error is assigned to the court's Findings Nos. xxxiv, xxxv, xlv, lix, and lxi.

The trial court denied the defense motion, and entered findings. CP 10-20. After a stipulated trial and sentencing, Mr. Fairbanks timely appealed. CP 21-23, 35-46.

ARGUMENT

THE WARRANTLESS SEARCH OF MR. FAIRBANKS’S HOME VIOLATED HIS RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

B. Warrantless searches are presumed to be unconstitutional, subject only to a few narrow exceptions.

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home

invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.⁶ *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under Article I, Section 7, searches conducted without authority of a search warrant are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. *State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.* Where police have ample opportunity to obtain a warrant, courts do not look kindly on

⁶ Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

their failure to do so. *State v. Ferrier*, 136 Wash. 2d 103, 115, 960 P.2d 927 (1998).

Article I, Section 7 explicitly guards the home against invasion without authority of law. Wash. Const. Article I, Section 7. Under this provision, “the home enjoys a special protection.” *State v. Schultz*, 170 Wash.2d 746, 753, 248 P.3d 484 (2011). The closer officers come to intrusion into a dwelling, the greater the constitutional protection. *Id.*

Consent is one exception to the warrant requirement. *Schultz*, at 754. However, before it can justify a warrantless entry, consent must be both “meaningful” and “informed.” *Id.*, at 754, 758. The state bears the burden of proving that any consent was voluntary. *State v. Reichenbach*, 153 Wash. 2d 126, 131, 101 P.3d 80 (2004). A search is unlawful if premised upon consent coerced “by explicit or implicit means, by implied threat or covert force.” *Schneekloth v. Bustamonte*, 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). To guard against such coercion, police seeking consent to search a house for evidence of a crime must notify the homeowner of the right to refuse consent, to revoke consent once given, and to limit the scope of the search. *Ferrier*, at 113.⁷

⁷ As the *Ferrier* court noted, “any knock and talk is inherently coercive to some degree...[T]he 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

Furthermore, the scope of consent may be restricted—in duration, location, or intensity—by implied limitations. *State v. Cotten*, 75 Wash. App. 669, 679, 879 P.2d 971, 978 (1994). The prosecution bears the burden of proving that the search did not exceed any implied limitations of the consent. *Reichenbach*, at 131.

C. The prosecution failed to prove that Mr. Fairbanks freely and voluntarily consented and that the officers complied with the implied limitations of the consent.

The prosecution did not prove that Mr. Fairbanks provided meaningful consent. The state’s proof was deficient in two regards.

First, as a result of his prior experience with the police (and in light of their significant show of force), Mr. Fairbanks did not believe any refusal to consent would be honored, despite the recitation of *Ferrier* warnings. RP 86-88, 90, 93-94, 97-98, 104, 110, 113-117. As the trial court found, Mr. Fairbanks “subjectively believed that officers would search his residence regardless of whether he voiced his consent.” CP 18.

This subjective belief rendered his consent involuntary: under the circumstances, Mr. Fairbanks did no more than give in to what he believed to be inevitable. The situation is analogous to those Fourth Amendment cases in which officers obtained consent through a baseless threat to get a

stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.”

warrant. *See, e.g., Bumper v. N. Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968) (“When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.”)

Second, Mr. Fairbanks clearly thought the officers were looking for a grow operation, and this placed an implied limitation on the scope of his consent. When initially asked for his consent, he immediately referenced the prior grow operation, and insisted on showing that there was no grow in the garage. RP 15-16, 55, 61, 75, 79, 109. He also led them through the rooms of his residence, opening each door so they could see there was no grow operation in the house. RP 15, 16, 20, 102, 104. Although the officers may have planned all along to search more intensely than would be required to rule out the presence of a marijuana grow, that does not mean Mr. Fairbanks consented to such a search. *See, e.g., State v. Monaghan*, 165 Wash. App. 782, 791, 266 P.3d 222 (2012) (suspect’s consent to allow search of vehicle’s trunk did not mean that officers could search locked containers within the trunk.)

The prosecution did not prove that Mr. Fairbanks voluntarily consented to a search of his home. Nor did the state prove the absence of any limitations on the scope of his consent. The trial court’s Conclusions of Law Nos. II , IV, VI, VII, VIII, IX, X, XI, and XII are incorrect. CP

18-20. Accordingly, his conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Ferrier, supra.*

CONCLUSION

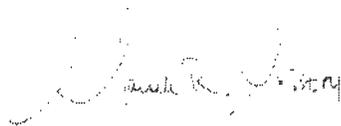
For the foregoing reasons, Mr. Fairbanks's conviction must be reversed. The evidence must be suppressed and the case dismissed with prejudice.

Respectfully submitted on April 17, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on April 17, 2012.



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