

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 Reply Brief

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ARGUMENT

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

When police have time to seek a warrant, their failure to do so is frowned upon. *State v. Ferrier*, 136 Wash. 2d 103, 115, 960 P.2d 927 (1998). If the state offers “consent” as a justification for a warrantless home search, it bears the heavy burden of proving the consent was meaningful, informed, and voluntary. *State v. Schultz*, 170 Wash.2d 746, 754, 248 P.3d 484 (2011); *State v. Reichenbach*, 153 Wash. 2d 126, 131, 101 P.3d 80 (2004). The prosecution also bears the burden of proving that a consent search did not exceed any implied limitations. *Reichenbach*, at 131.

Here, the court found that Mr. Fairbanks believed officers would search his home regardless of whether or not he consented. CP 18. This factual finding necessarily precludes a finding of voluntariness: the consent was not meaningful, informed, or voluntary. *Schultz*, at 754; *Reichenbach*, at 131; see also *Bumper v. N. Carolina*, 391 U.S. 543, 550, 550 n.14, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). Respondent does not dispute this finding; it is therefore a verity on appeal. *In re Dependency of MSR*, 174 Wash. 2d 1, 9, 271 P.3d 234, reconsideration denied, as corrected (2012). Respondent argues that *Bumper* is distinguishable,

because this case did not involve a police assertion of authority. Brief of Respondent, p. 10.

Mr. Fairbanks did no more than accede to what he believed was inevitable. Cf. *Bumper*, at 548-49. Given this actual subjective belief—whether reasonable or not— the prosecution cannot establish consent that is meaningful and voluntary, even if (as Respondent implies) it was “informed.” See Brief of Respondent, p. 10. Nor does it matter if (as Respondent contends) the police did nothing to encourage Mr. Fairbanks’s subjective belief: the voluntariness of consent has never been solely dependent on the presence or absence of police misconduct.

Furthermore, Mr. Fairbanks’s belief that officers were looking for a grow operation created an implied limitation on the scope of his consent. It is the prosecution’s burden to show that Mr. Fairbanks actually—subjectively—intended to consent to a full-blown search of the smallest areas of his home, including areas which could not accommodate a grow operation. It is irrelevant that Mr. Fairbanks did not speak up and voice this limitation aloud. Under the law of consent, his subjective intent controls—a person can only provide meaningful consent if s/he understands what is being allowed—and the prosecution bears the burden of proving that intent. *Reichenbach*, at 131.

The state undertook this near-impossible burden by relying on consent, rather than a search warrant, for this search of a private residence. The prosecution failed to prove the absence of any implied limitations, and Respondent has provided no authority suggesting it should be excused from doing so. Accordingly, the conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. *Id.*

CONCLUSION

Mr. Fairbanks's conviction must be reversed and the case dismissed.

Respectfully submitted on July 30, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply 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 Reply 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 July 30, 2012.

A handwritten signature in cursive script, appearing to read "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 30, 2012 - 8:19 AM

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