

NO. 42785-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL FAIRBANKS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-00044-1

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred by finding that Samuel Fairbanks provided a free and voluntary consent to search his garage and residence when this finding is clearly supported by substantial evidence in the record?

2. Whether the trial court erred by finding that there were no implied limitations on the consent to search when the record clearly shows that Samuel Fairbanks gave a general and unqualified consent to the search of his garage and residence?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Appellant, Samuel Fairbanks, was charged by information filed in Kitsap County Superior Court with one count of Possession of a Controlled Substance (Methamphetamine). CP 1. He was found guilty as charged after a stipulated facts trial and was sentenced. CP 21, 24.

### **B. FACTS**

On October 13, 2010, law enforcement from the Kitsap County Sheriff's Office went to a residence on Alaska Avenue in Port Orchard, Washington (RP 7-8).<sup>1</sup> They were following up on a complaint of someone who had smelled the odor of marijuana coming from the

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<sup>1</sup> The only verbatim report of proceedings that will be cited by the State is from the evidentiary hearing on August 2, 2011.

residence (RP 7). The Appellant was one of the individuals identified in the complaint (RP 8). Sergeant VanGesen noted that he was familiar with the residence from a prior case at the same location involving the Appellant and his wife where methamphetamine and marijuana had been discovered (RP 8). Sergeant VanGesen noted that the way the house was situated, there was no shoulder for cars to safely park (RP 9, 12). The driveway is on the south side of home and is about two to three car lengths wide (RP 9).

Sergeant VanGesen knocked on the door and verbally identified himself to the Appellant, who answered (RP 13). Sergeant VanGesen said that there was a dog barking when he knocked, so he asked the Appellant to secure the animal so there would no issues with it. The Appellant shut the closed the door and secured the dog in one of the rooms while Sergeant VanGesen and Detective Gundrum remained outside the residence on the porch (RP 14-15). Both he and Detective Gundrum were dressed in plain clothes (RP 9). Neither displayed their firearm, though they were visible (RP 15). Deputy Menge was standing near a car in the driveway, but Sergeant VanGesen could not see any other officers standing next to him (RP 144).

Once the Appellant returned to the door, Sergeant VanGesen explained to him that they were there because they had received a report

of an odor of marijuana coming from the home (RP 16). The Appellant insisted that he did not have marijuana grow, stating that there had been marijuana grow in the garage once but it was no longer there (RP 16). Sergeant VanGesen then asked the Appellant if he was willing to give consent for them to search the residence. The Appellant said that he would and Sergeant VanGesen read the Appellant his *Ferrier* warnings, using a written form from the sheriff's office (RP 15-16).

Sergeant VanGesen went over each of the Appellant's rights in the form, first establishing that he had authority to consent to search as the only adult on the premise and that it was his home that they were about to search (RP 17). Sergeant VanGesen read the form to the Appellant, reading each of the warnings to him verbatim (RP 17-18). He did not have the Appellant sign the form, but stated that because a signature is not a requirement, he does not typically have the individual sign the form (RP 18-19). Sergeant VanGesen said that as long as an individual shows that they understand the document and the warnings, that there is nothing to influence their decision, and that they are mentally and physically capable of giving voluntary consent, he does not have that person sign the form (RP 19). Based on his observations and the follow up questions, Sergeant VanGesen determined that the Appellant had given voluntary consent to search the premises (RP 19). Sergeant VanGesen noted that the

Appellant's voluntariness was clear to him since he had wanted to show the garage to them even before Sergeant VanGesen went over his *Ferrier* warnings (RP 60).

Sergeant VanGesen stated that he advised the Appellant that they were going to search the premises and that they had a conversation that this was to include the garage and the house (RP 20). He said that he asked the Appellant questions about any illegal items that might be in the house, but he did not list the specific items that they were going to search for, and that no limitations were placed on the search by either himself or the Appellant (RP 21-22). The Appellant also noted that there were never any search parameters discussed when the warning was given (RP 109).

After obtaining the Appellant's consent to search, Sergeant VanGesen and Detective Gundrum followed him to the garage and confirmed that there was no longer a marijuana grow there (RP 22). No other officers were in the vicinity of the garage (RP 144-145). As they were walking back from the garage the Appellant pulled a marijuana pipe and a plastic bag of marijuana from his person and gave it to the officers (RP 22-23). The Appellant led the officers from the garage back into the house and gave no indication that he did not want them to enter the house (RP 24). When Sergeant VanGesen and Detective Gundrum entered the house with the Appellant, they were joined by Deputies Menge and Edje

(RP 145). No other officers had entered the residence prior to that (RP 145).

The Appellant testified that once they were in the house, he moved the dog from the master bedroom to another bedroom (RP 103). Once this had been done, the officers entered the master bedroom and began searching the dressers and end tables (RP 26). Inside one of the top drawers, Sergeant VanGesen found a balance scale with some white powder on the mirrored dresser along with a spoon with some white residue on the night stand next to the bed (RP 26, 49). The Appellant was in the room when the items were located, but was moving around and had not been told he could not leave (RP 26-27).

After the items had been discovered, the Appellant made a comment to Sergeant VanGesen that “he could tell them to stop searching at any time” (RP 28, 146). Sergeant VanGesen told him that he could just as he had explained earlier. Sergeant VanGesen stated that the Appellant never asked the officers to stop searching nor did he tell them to limit their search (RP 28). Because the Appellant had restated the *Ferrier* warning to him, it was clear to Sergeant VanGesen that he was demonstrating that he understood the warnings—he did not believe the Appellant was actually asking him to stop searching (RP 61).

Right after making the comment, the Appellant went into the

bathroom attached to the master bedroom and Sergeant VanGesen heard the toilet flush (RP 29). He immediately went into the bathroom and observed a clear plastic baggy with a knot tied in one end in the toilet (RP 29). The baggy had been opened and there was nothing inside (RP 29). The Appellant came into the bedroom after flushing the toilet and initially denied doing so (RP 30). He later admitted that he had flushed marijuana down the toilet (RP 146). After having the Appellant open a safe located in the master bedroom, Sergeant VanGesen had him go into the living room area to have a seat on the couch (RP 31). He stated that he now had concerns about officer safety given the Appellant's attempt to destroy evidence (RP 31-32). Officers were still able to communicate with the Appellant and he could see parts of the house that were being searched (RP 32).

The search of the residence continued, including a dining room and an extra bedroom. In that bedroom on the nightstand, officers located another digital scale and some drug testing kits (RP 33). Sergeant VanGesen noted that during the entire search, the Appellant never asked them to leave the residence and never told them to stop searching (RP 35-36).

### III. ARGUMENT

#### A. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT SAMUEL FAIRBANKS FREELY AND VOLUNTARILY CONSENTED TO THE SEARCH OF HIS GARAGE AND RESIDENCE BECAUSE THIS FINDING IS CLEARLY SUPPORTED BY SUBSTANTIAL EVIDENCE

Fairbanks argues that the prosecution failed to prove that he freely and voluntarily consented to the search of his home. This claim is without merit because it is clear from the record below that law enforcement did obtain a valid consent from the Appellant.

One of the exceptions to the warrant requirement is a search that is conducted pursuant to a consent. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). For a consent to be valid, there are three factors that must be present: (1) the consent was voluntary; (2) person giving the consent had the authority to do so; and (3) the search must not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); *State v. Nedergard*, 51 Wn.App. 304, 308, 753 P.2d 526 (1988).

The State has the burden of showing that the consent was voluntary and in determining voluntariness, the Court looks at the totality of the circumstances. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999); *Bumper v. North Carolina*, 391 U.S. 543, 88

S.Ct. 1788 (1968). These factors can include the degree of education and intelligence of the consenting individual; whether or not the consenting individual had been advised of his right to refuse to consent; and the experience of the individual in the criminal justice system. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999). When law enforcement is conducting “knock and talks”, before entering the home they must inform the individual that he or she may lawfully refuse to consent to the search, that they can revoke the consent at any time; and that they can limit the scope of their search. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). A finding of consent may be invalidated if the circumstances are so coercive so as to negate the voluntariness of the consent. *State v. Werth*, 18 Wn.App. 530, 571 P.2d 941 (1977).

The Appellant claims that because of his prior experience with law enforcement and “in light of their significant show of force”, he did not believe his refusal to consent would be honored. First, the record below clearly demonstrates that there was not a “significant show of force” when law enforcement searched the home. Sergeant VanGesen testified that it was only himself and Detective Gundrum that went with the Appellant to search the garage (RP 22). Both were dressed in plain clothes and neither displayed a weapon during the entire contact (RP 15). It was only after Sergeant VanGesen and Detective Gundrum entered the residence that two

other deputies joined them to help in the search (RP 145 ). During most of the search, the Appellant was free to move around his residence and he remained in the master bedroom with Sergeant VanGesen and Detective Gundrum throughout most of their search (RP 145). There is nothing to indicate that this was such a significant show of force such that the Appellant felt intimidated into consenting to the search.

The present situation is much different than ones in which the Courts have found that the coercive factors overcame the consent of the individual. For example, in *State v. Werth*, 18 Wash.App. 530, 571 P.2d 941 (1977), the defendant was ordered out of her residence by law enforcement. She was ordered to keep her hands in plain view and she saw at least one officer armed with a shot gun. Additionally, her home had been illegally searched just two days prior. *Id.* at 535. There is nothing in the present case that raises the same concerns about coercion.

Further, while the Appellant may have felt that the officers would have searched his residence regardless of whether or not he consented, he never once indicated to Sergeant VanGesen that he did not understand the *Ferrier* warnings nor did he express any concerns about law enforcement's presence at his home. In fact, Sergeant VanGesen noted that the Appellant seemed "eager" to allow them to search his residence, even trying to take them to his garage before the *Ferrier* warnings were

given (RP 60). That is certainly not the behavior of an individual who was intimidated by the presence of law enforcement.

The Appellant argues that the situation he was placed in is analogous to circumstances where law enforcement uses a baseless threat to obtain a warrant, citing *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968). There, law enforcement told the individual that they had a search warrant to search her house. Believing that they did, she told them to “go ahead” and let them in though she never actually saw the warrant. *Id.* at 546. The sole issue in *Bumper* was whether or not a search could be lawful on the basis of consent when the consent had been given only after the officer had stated that he had a warrant. The Court held that under those specific circumstances, there could be no consent. *Id.* at 548.

The *Bumper* case is clearly distinguishable from the present case. Sergeant VanGesen explained to the Appellant why they were there, asked for his consent to search his home, and then read him his *Ferrier* warnings. The basis of Fairbanks’ consent was not based on any assertion from law enforcement that they had a warrant, but rather on his free and voluntary consent. Therefore, there is no error in the trial court’s Finding of Fact XXXIV, LVI, LXI, and its Conclusions of Law II, IV, and VIII.

**B. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THERE WERE NO LIMITATIONS PLACED ON THE SEARCH OF THE GARAGE AND RESIDENCE BECAUSE IT IS CLEAR THAT SAMUEL FAIRBANKS GAVE A GENERAL AND UNQUALIFIED CONSENT**

Fairbanks next claims that if one believes that he did consent to the search, law enforcement did not comply with the implied limitations of his consent. This claim is without merit because the record below contains no evidence that there was any type of limitations, implied or not, placed on the search of the Appellant's home.

For a search to be valid, it must not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); *State v. Nedergard*, 51 Wn.App. 304, 308, 753 P.2d 526 (1988). *State v. Mueller*, 63 Wash.App. 720, 821 P.2d 1267 (1992), illustrates how the courts have looked at the scope of consent. In *Mueller*, the defendant was stopped because the officer believed he was intoxicated. Mueller gave the officer a "general, unqualified consent to search the vehicle for guns and drugs." *Id.* at 721. While searching Mueller's car, the trooper found a gym bag and asked him if it was his. Mueller said that it was and when the bag was searched, the trooper found white powder and cash. *Id.* at 721. The Court held that the gym bag did not exceed the scope of Mueller's consent and that he placed no express or implied limitations on the scope of his general consent to search the car. *Id.* at 722-24.

The Appellant argues that because he thought law enforcement was looking for a marijuana grow, therefore that placed an implied limitation upon the search to look only for the grow, relying on *State v. Monaghan*, 165 Wash.App. 782, 266 P.3d 222 (2012) for this premise. But Sergeant VanGesen was clear that while he told the Appellant they were there because of a complaint about the odor of marijuana, there was no discussion about what items he would specifically be searching for and that he did ask the Appellant what “illegal” items might be present in his home (RP 16, 20-22). Even after the garage (the prior site of the marijuana grow) had been searched and no grow had been found, the Appellant never once indicated to the officers that he believed the search was over. In fact, he accompanied the officers into his house and moved his dog from the master bedroom into another bedroom so officers could search it (RP 24,103). This behavior is certainly not indicative of one who intended to limit the scope of the search.

Further, *State v. Monaghan* is clearly different from the Appellant’s situation. In *Monaghan*, the Court found that while the defendant had given consent to search his vehicle, the scope of his consent was exceeded when officers searched a locked container in his trunk without asking him first. *Id.* at 791. The Court clearly saw a locked container as a separate item that one needed permission or a warrant to

search, circumstances that do not exist in this case. Like the *Mueller* case, the Appellant gave a general and unqualified consent for law enforcement to search the premises. Neither he nor law enforcement placed any type of limitation on this consent.

The Appellant also argues that he told law enforcement to stop their search, testifying at the evidentiary hearing that he told them to “stop” searching several times (RP 104-105, 108-109). Sergeant VanGesen testified that Fairbanks never told them to stop—rather he made a statement that he could tell them to stop at any time and Sergeant VanGesen told him that he could. There was never any further discussion about that (RP 28, 61, 146). In its ruling, the trial court noted that in his testimony, Fairbanks gave several different versions of what he might have said to the officers about stopping the search (RP 195-197). The trial court did not find his testimony on this particular point reliable because of his inconsistency, but did find Sergeant VanGesen’s testimony consistent (RP 201). The trier of fact is “in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying.” *State v. Hill*, 123 Wash.2d 641, 646, 870 P.2d 313 (1994). A trial court’s findings in a suppression hearing are reviewed under the clearly erroneous standard—where substantial evidence supports the trial court’s findings, they are binding. *Id.* at 647. Here, the trial court was in

the best position to determine the credibility of Sergeant VanGesen and the Appellant on whether or not the Appellant told the officers to stop the search. The trial court found Sergeant VanGesen's testimony to be more reliable because it was consistent where Fairbanks' was not (RP 195-197, 201). It is of note that the trial court did find the Appellant's testimony credible on other points, thus making its finding on this point even more reliable. There is simply no evidence here that the finding that Fairbanks never told the officers to stop the search was clearly erroneous. What is clear is that there were no limitations, implied or otherwise, placed on the scope of the search of Appellant's garage and residence. Therefore, there was no error in the trial courts Findings of Fact XXXV, XXXVII, XLV, XLIX, L, LI, LVI, LIX, LXI and its Conclusions of Law VI, VII, VIII, IX, X, XI, and XII.

#### **IV. CONCLUSION**

For the foregoing reasons, Fairbanks's conviction and sentence should be affirmed.

DATED July 10, 2012.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'KLP', with a long horizontal flourish extending to the right.

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# KITSAP COUNTY PROSECUTOR

## July 11, 2012 - 9:05 AM

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