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NO. 53203-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN TRUONG,
Appellant.

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

Cowlitz County Cause No. 18-1-01156-3

The Honorable Anne M. Cruser, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The evidence used to convict Mr. Truong was seized in violation of his rights under the Fourth and Fourteenth Amendments.
2. The evidence used to convict Mr. Truong was seized in violation of his rights under Wash. Const. art. I, § 7.
3. The warrantless search of Mr. Truong's home violated his rights under the Fourth Amendment.
4. The warrantless search of Mr. Truong's home violated his rights under art. I, § 7.

ISSUE 1: The police conduct a warrantless search by invading areas of a home's curtilage beyond those impliedly open to the public. Did Officer Jenkins conduct a search of Mr. Truong's home (in an apartment in a garage) by standing immediately next to the garage – far from the front door, the street, or any access route – and peering into the rafters?

5. The evidence used against Mr. Truong was not admissible under the plain view doctrine.

ISSUE 2: A search has not occurred if a police officer is in an area where s/he has a right to be and inadvertently discovers an item that is immediately apparent to be contraband or evidence of a crime. Does the plain view doctrine not apply to Officer Jenkins's search of Mr. Truong's garage/apartment when she discovered the item intentionally and did not know whether it constituted evidence or contraband until after a later warrant search of the bag?

6. Mr. Truong's art. I, § 7 claim may be raised for the first time on appeal under RAP 2.5(a)(3).

ISSUE 3: Manifest error affecting a constitutional right may be raised for the first time on appeal. Can Mr. Truong's art. I, § 7 claim be raised for the first time on appeal when it affects his constitutional right to privacy, led to direct prejudice, and all of the necessary facts are in the record?

7. Mr. Truong was denied his Sixth Amendment right to the effective assistance of counsel.
8. Mr. Truong's defense attorney provided ineffective assistance by failing to move to suppress evidence that was seized pursuant to an unconstitutional warrantless search.

ISSUE 4: A defense attorney provides ineffective assistance of counsel by unreasonably failing to move to suppress evidence obtained in violation of his/her client's constitutional rights. In the alternative, did Mr. Truong's defense attorney provide ineffective assistance by failing to move to suppress evidence seized pursuant to an unconstitutional search, without which the state's prosecution would not have been able to move forward?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

John Truong and/or his girlfriend¹ lived in the garage associated with Mr. Truong's parents' house. RP 53, 92, 119, 159.² The garage was detached from the house and had been converted in a kind of apartment, with a bed, clothing, and other items throughout. RP 37, 54, 121.

The garage/apartment had a front door as well as an electronic garage type door for cars to use. RP 54. There were two cars parked in the driveway in front of the garage. RP 37. The front door to the garage was next to the front door to the main house. RP 54.

Mr. Truong's friend, Torey Petersen was involved with methamphetamine and heroin and had paranoid tendencies. RP 43. One morning, when he was visiting Mr. Truong, Petersen called his mother and told her that he was afraid that he was in danger. RP 30, 96-97. Peterson's mother then called 911. RP 43.

The police responded to the garage/apartment. RP 30. Because Mr. Truong was on community custody at the time, Community Corrections Officers (CCOs) from the Department of Corrections (DOC) responded as

¹ It was disputed at trial who lived in the garage/apartment. *See e.g.* 53, 92, 119, 159-60. But it was undisputed that Mr. Truong had stayed there the night before his arrest and that the evidence used to convict him had been seized from there. *See* RP 161-63, 167. The state's trial theory was that Mr. Truong lived in the garage/apartment fulltime. RP 224-25.

² All citations to the Verbatim Report of Proceedings refer to the chronologically-number volumes spanning 10/16/18 through 4/15/19.

well. RP 52-53. Mr. Truong had a DOC warrant because the CCOs believed that he had failed to update his address. RP 122-25.

One CCO arrested Mr. Truong and found a small scale with what appeared to be drug residue on it in his pocket. RP 61. Another CCO proceeded to search the entire garage/apartment. RP 118-21.

But the CCOs did not conduct the search alone. Longview Police Officer Danielle Jenkins stood at the end of the driveway furthest from the street. RP 36. She was also on the side of the garage furthest from the front door to the house and the front door to the garage/apartment. RP 36. She could not see the front door from where she was. RP 36.

Officer Jenkins testified that, as she watched the CCOs search the garage/apartment, she “was kind of like looking around, and [] was like, well, there’s a bag up there in the rafters that looks odd.” RP 37.

Officer Jenkins asked the CCOs to get the bag down, which they did. RP 38. Then the CCOs brought the bag to Officer Jenkins, who obtained a search warrant for it. RP 38. The bag was described at trial as a “lunchbox-style” bag with a safe inside of it. *See e.g.* RP 84.

A warrant search of the bag and safe revealed them to contain a gun, methamphetamine, heroin, small Ziploc-style bags, bullets, \$785 in cash, and some documents associated with Mr. Truong’s girlfriend and her child. RP 68, 78, 82, 87.

The state charged Mr. Truong with drug possession with intent to deliver and unlawful possession of a firearm.³

Mr. Truong's defense attorney did not move to suppress the evidence seized pursuant to the search of the garage/apartment at trial. *See RP generally.*

The jury found Mr. Truong guilty of the offenses. CP 39-40. This timely appeal follows. CP 58.

ARGUMENT

THE EVIDENCE AGAINST MR. TRUONG WAS SEIZED PURSUANT TO AN UNCONSTITUTIONAL WARRANTLESS SEARCH OF HIS HOME.

The police did not have the authority to search the garage/apartment where the evidence against Mr. Truong was found because they did not have a warrant. *See RP generally.* The police attempted to work around this problem by having the search conducted by a Community Corrections Officer (CCO). RP 118-21. But the CCO is not the one who did the relevant part of the search.

Almost all of the evidence against Mr. Truong was found in a lunchbox-type bag that had been placed in the rafters of the garage. RP 137-38. That bag was found by Officer Jenkins, not a CCO. RP 137-38.

³ The state also charged Mr. Truong with misdemeanor harassment based on alleged threats to Petersen. CP 1-3. But the jury acquitted him of that charge. CP 41.

There were two parked cars blocking the view to the interior of the garage. RP 37. But Officer Jenkins stood at the end of the driveway furthest from the street. RP 36. She was on the side of the driveway furthest from the front door to both the house and the garage/apartment. RP 36. Officer Jenkins could not even see the front door to the house from where she stood. RP 36.

From this vantage point, Officer Jenkins stood close enough to the interior of the garage to watch the CCO conduct the search and to notice an item that the CCO had missed – the lunchbox in the rafters. RP 37.

The garage is detached from the house and Officer Jenkins stood far from the normal access routes that are impliedly open to the public. RP 35-37. Officer Jenkins conducted a warrantless search of Mr. Truong's home.

But the constitution does not permit police officers to conduct warrantless searches of the homes of people on community custody. The police overstepped their constitutional bounds in Mr. Truong's case by conducting a warrantless search of his home, rather than allowing the CCOs to do it themselves pursuant to their probationary authority.

The evidence against Mr. Truong should have been suppressed.

- A. Rather than permitting the DOC officers to search the garage/apartment pursuant to their probationary authority, Officer

Jenkins conducted her own search by standing in an area of the curtilage that was not impliedly open to the public and peering far enough into the garage to notice an item that the DOC officer had not seen. Officer Jenkins's warrantless search was not constitutionally permissible.

The Fourth Amendment to the U.S. Constitution protects against unlawful search and seizure. U.S. Const. Amends. IV; XIV. Art. I, § 7 of the state constitution protects against unlawful intrusion into "private affairs." Art. I, § 7. Art. I, § 7 provides greater protection than the Fourth Amendment because it focuses on "the disturbance of private affairs" rather than the reasonableness of police conduct. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011) *review denied*, 173 Wn.2d 1011, 268 P.3d 943 (2012); *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007);

Warrantless searches are *per se* unreasonable unless they fall within one of the few recognized exceptions to the warrant requirement. *Id.* The burden is on the state to demonstrate that one of those exceptions applies to a given case. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

A person's home is "the area most strongly protected by the constitution." *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000) (*citing State v. Rose*, 128 Wn.2d 388, 391–92, 909 P.2d 280 (1996); *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994); *State v. Chrisman*,

100 Wn.2d 814, 820, 676 P.2d 419 (1984); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)).

Different constitutional standards apply to searches by police officers than to searches of active probationers by DOC officers.

DOC officers are permitted to search a probationer's "person, residence, automobile, or other personal property" based on mere "reasonable cause to believe that [the] offender has violated a condition or requirement of [his/her] sentence." RCW 9.94A.631(1).

Police officers, on the other hand, must obtain a warrant before searching *anyone's* home, unless one of the other exceptions to the warrant requirement is met.

This is diminished constitutional protection in the case of DOC searches is permissible because:

a probation officer's role is rehabilitative rather than punitive in nature, [and] a probation officer's search according to his supervisory duties is distinguishable from that of a police officer competitively 'ferreting out crime.'

State v. Reichert, 158 Wn. App. 374, 387, 242 P.3d 44 (2010) (citing *State v. Simms*, 10 Wn. App. 75, 85, 516 P.2d 1088 (1973); *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)).⁴

⁴ The *Reichert* court notes in *dicta* that a DOC officer can permissibly "enlist the aid of police officers in performing his duty." *Reichert*, 158 Wn. App. at 378. But that is not what happened in Mr. Truong's case. The CCOs did not simply ask the police to provide

(Continued)

In Mr. Truong’s case, Officer Jenkins impermissibly attempted to step into the shoes of a DOC officer. But Officer Jenkins is not a DOC officer. The constitutional required her to obtain a warrant before searching Mr. Truong’s home.

1. Officer Jenkins conducted a search of Mr. Truong’s home by invading an area of the curtilage not impliedly open to the public and actively looking for evidence of a crime there.

An individual has a very high privacy interest in the interior of his/her home. *State v. Houvener*, 145 Wn. App. 408, 416, 186 P.3d 370 (2008). This privacy interest extends to all types of residences, even temporary ones. *Id.*

The curtilage – the “area contiguous with a home” – is “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’” of constitutional protection. *Ross*, 141 Wn.2d at 312; *State v. Jesson*, 142 Wn. App. 852, 858, 177 P.3d 139 (2008).

Even so, police “with legitimate business” can enter the areas of the curtilage of a home that are impliedly open to the public, such as a walkway or other access route to a house. *Jesson*, 142 Wn. App. at 858; *Ross*, 141 Wn.2d at 312; *State v. Smith*, 113 Wn. App. 846, 852, 55 P.3d 686 (2002).

information or secure the area for the probationary search. Instead, a police officer *actually conducted* the search that revealed the evidence against Mr. Truong.

When in such impliedly open areas of the curtilage, an officer must still conduct him/herself “as would a reasonably respectful citizen.” *Jesson*, 142 Wn. App. at 858; *Ross*, 141 Wn.2d at 312.

If an officer who is permissibly within the open areas of the curtilage of a home detects contraband therein, that does not constitute a search under the constitution. *Jesson*, 142 Wn. App. at 858; *Ross*, 141 Wn.2d at 313. But an officer exceeds the scope of the invitation and violates the constitutional protection of privacy by unreasonably departing from the areas of the curtilage that are open to the public. *Smith*, 113 Wn. App. at 852. Whether the officer has conducted an unconstitutional invasion of privacy turns on all of the facts and circumstances of each case. *Id.*

Officer Jenson was not within an area of the curtilage of Mr. Truong’s home that was impliedly open to the public. She was not on an access route or walkway to the home. She could not even see the front door to the main house or the garage from where she stood. RP 36. She was at the end of the driveway furthest from the street. RP 36.

It is not clear whether the electronic garage door was opened all the way by Mr. Truong or by the DOC officers. Either way, however, the view into the interior of the garage was blocked from public view by two cars parked in the driveway. RP 37.

The only way that Officer Jenkins was able to see the rafters of the garage was by invading the areas of the curtilage far from those open to the public. Those areas of Mr. Truong’s home are provided the same constitutional protection as the interior itself. *Ross*, 141 Wn.2d at 312.

Additionally, Officer Jenkins was not “behaving like a reasonably respectful citizen” by peering into the rafters of Mr. Truong’s home. *Jesson*, 142 Wn. App. at 858; *Ross*, 141 Wn.2d at 312. Even if she had confined herself to the access routes to the house, her conduct would still have been impermissible. *Id.*

Furthermore, a police officer is not lawfully on a person’s property when his/her “only purpose is to conduct a search and gain information.” *Ross*, 141 Wn.2d at 313–14 (*quoting State v. Johnson*, 75 Wn. App. 692, 704–05, 879 P.2d 984 (1994)).

Mr. Truong had already been arrested at the time of Officer Jenkins’s search. RP 61. Officer Jenkins had no purpose for standing immediately next to the garage and peering into the rafters other than to “conduct a search and gain information.” *Ross*, 141 Wn.2d at 313–14. Again, her conduct would have been impermissible even if she had remained in the areas of the curtilage impliedly open to the public. *Id.*

The fact that a DOC officer was also searching the garage at the time of Officer Jenkins’s unconstitutional search does not change the

analysis. The “inevitable discovery rule” does not apply under art. I, § 7. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). Indeed, it is far from clear that the DOC officer would have found the small lunchbox in the rafters had Officer Jenkins not intervened. Officer Jenkins’s search did not fall into any of the exceptions to the warrant requirement, regardless of what else was going on at the time.

Officer Jenkins conducted an unconstitutional warrantless search of Mr. Truong’s home. *Jesson*, 142 Wn. App. at 858; *Ross*, 141 Wn.2d at 312; *Smith*, 113 Wn. App. at 852. The fruits of that search – the lunchbox and its contents – should have been suppressed at trial. *Id.* Mr. Truong’s convictions must be reversed. *Id.*

2. Even if Officer Jenkins had remained in the areas of the curtilage impliedly open to the public, the plain view exception to the warrant requirement still would not apply because her discovery was not inadvertent, and it was not immediately apparent that the lunchbox contained contraband.

Under the plain view doctrine, an unconstitutional search has not occurred if: (1) a police officer is in an area where s/he is permitted to be, (2) inadvertently discovers incriminating evidence, and (3) it is immediately clear that the item found is contraband or evidence of a crime. *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

Here, even if Officer Jenkins had been permitted to invade the curtilage of Mr. Truong’s home, the plain view doctrine still does not

apply to her discovery of the lunchbox in his case. *Id.* This is because the discovery was not inadvertent – Officer Jenkins was intentionally peering into the rafters of the home. It was also not immediately clear that the lunchbox contained contraband or evidence of a crime – the police had to obtain a warrant to search it before the drugs and gun were found.

The plain view doctrine does not apply to Officer Jenkins’s discovery of the evidence against Mr. Truong. *Id.* That evidence should have been suppressed at trial, and Mr. Truong’s convictions must be reversed. *Id.*

B. Mr. Truong can raise this issue for the first time on appeal because it constitutes manifest error affecting a constitutional right.

An issue may be raised for the first time on appeal if it constitutes manifest error affecting a constitutional right. RAP 1.5(a)(3).

A claim of violation of art. I, § 7 clearly affects a constitutional right. *State v. Jones*, 163 Wn. App. 354, 359–60, 266 P.3d 886 (2011).

Accordingly, such an error may be raised for the first time on appeal if it is “manifest,” meaning that the accused was actually prejudiced and “the facts necessary to adjudicate the claimed error are in the record on appeal.” *Id.* (citing *State v. Kirwin*, 165 Wn.2d 818, 823–24, 203 P.3d 1044 (2009)).

The error is manifest in Mr. Truong's case. He was actually prejudiced by the admission of the drugs, ammunition, packaging materials, and drugs found in the lunchbox. Indeed, without that evidence, the state would not have been able to prosecute him.

The facts necessary to adjudicate this error are also in the record on Mr. Truong's appeal. Officer Jenkins described where she was standing and what she was doing at the time of her search at length. *See* RP 35-37. No other facts are necessary to evaluate the permissibility of her actions.

This court should consider Mr. Truong's art. I, § 7 claim under RAP 2.5(a)(3). *Jones*, 163 Wn. App. at 359–60.

C. In the alternative, if this issue is waived, then Mr. Truong's trial attorney provided ineffective assistance of counsel by failing to move to suppress the fruits of the unconstitutional warrantless search.

In the alternative, if Mr. Truong's art. I, § 7 claim is waived, then he received ineffective assistance of counsel at trial.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (*Jones II*).⁵

⁵ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones II*, 183 Wn.2d at 338.

Failure of defense counsel to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Jones II*, 183 Wn.2d at 339. Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability⁶ that counsel's mistakes affected the outcome of the proceedings. *Id.*

Here, failure by Mr. Truong's defense attorney to move to suppress the evidence discovered by Officer Jenkins constitutes deficient performance. There was no valid tactical reason for waiving suppression of the very evidence required to convict Mr. Truong. As outlined above, Officer Jenkins's search of Mr. Truong's home was constitutionally impermissible. A reasonable defense attorney would have moved to suppress.

Mr. Truong was prejudiced by his attorney's deficient performance. Without the evidence discovered pursuant to Officer

⁶ A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; see also *Jones II*, 183 Wn.2d at 339.

Jenkins's search, the case against him would not have been able to move forward.

In the alternative, if Mr. Truong's art. I, § 7 claim is waived, then his defense attorney provided ineffective assistance of counsel by failing to move to suppress. Mr. Truong's convictions must be reversed.

Reichenbach, 153 Wn.2d at 137.

CONCLUSION

The evidence used to convict Mr. Truong was seized in violation of his rights under art. I, § 7. His convictions must be reversed.

Respectfully submitted on December 19, 2019,



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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(s), 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 Seattle, Washington on December 19, 2019.



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