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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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ARGUMENT

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

Article I, section 7 does not permit police officers to conduct warrantless searches of people's homes, even if they are on community custody. Officer Jenkins overstepped the 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. The state appears to concede that 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.

The state does not contest that Officer Jenkins invaded the areas of the curtilage of Mr. Truong's home that are not impliedly open to the public. Nor does the state argue that Officer Jenkins was doing anything other than looking for evidence of a crime. *See* Brief of Respondent *generally*.

The state's failure to rebut Mr. Truong's arguments on these issues may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

- B. 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.

Mr. Truong relies on the argument set forth in his Opening Brief.

- C. The DOC Officers did not “enlist the aid” of Officer Jenkins in conducting their probationary search of Mr. Truong’s garage.

Officer Jenkins testified that she was watching the DOC officers conduct their probationary search when she noticed the bag in the rafters of the garage. RP 36-38. Mr. Truong had already been arrested and the house had been cleared. RP 62. Officer Jenkins was not helping the DOC officers with the search or even securing the premises anymore by the time the search was going on.

Even so, the state argues that Officer Jenkins’s search was permissible because DOC officers “may enlist the aid of police officers” when conducting a probationary search. Brief of Respondent, p. 9 (*citing State v. Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973)).

But the DOC officers did not “enlist the aid” of Officer Jenkins in conducting their duties. They did not ask her to provide information or secure the area. Instead, Officer Jenkins actually *conducted the search herself*. RP 36-38. The state’s argument is of no consequence to Mr. Truong’s case.

D. Mr. Truong can raise this issue of the unconstitutional warrantless search of his home for the first time on appeal because it constitutes manifest error affecting a constitutional right.

A claimed violation of art. I, § 7 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.” *State v. Jones*, 163 Wn. App. 354, 359–60, 266 P.3d 886 (2011) (citing *State v. Kirwin*, 165 Wn.2d 818, 823–24, 203 P.3d 1044 (2009)).

The facts necessary to adjudicate this error are 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.

Officer Jenkins testified that she was watching the DOC officers conduct their probation search when 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 then brought the bag to the attention of the DOC officers and asked them to bring it to her. RP 38.

Even so, the state attempts to identify three facts for the adjudication of Mr. Truong’s claim that are not in the record on appeal. Brief of Respondent, pp. 5-7. But the facts the state points to are not necessary to the determination of Mr. Truong’s claimed error.

First, the state points out that “nowhere in the record does it say that Truong was on active DOC supervision at the time of the search.” Brief of Respondent, p. 5. But the DOC officers specifically testified that they were the ones with the authority to search Mr. Truong’s residence. RP 119. Even if the evidence regarding whether Mr. Truong was on DOC supervision is ambiguous, however, that evidentiary gap would hurt, rather than help, the state’s argument. If Mr. Truong was not on DOC supervision, then neither Officer Jenkins *nor the DOC officers* had constitutional authority to search the garage.

Second, the state argues that “the record is completely silent as to the conditions of [Mr. Truong’s] probation.” Brief of Respondent, p. 6. Again, the state fails to identify any purpose that evidence regarding Mr. Truong’s claimed error. The conditions of Mr. Truong’s supervision may have been relevant to a claim that a DOC officer overstepped his/her authority in searching the garage. But Mr. Truong’s argument is that Officer Jenkins did not have the authority to search the garage because she was not a DOC officer. The details of the conditions of Mr. Truong’s supervision are inapposite.

Finally, the state notes the evidence that Mr. Truong’s mother gave the officers permission to search her home. The state argues that “If the homeowner gave unqualified consent to search the residence, including

the garage, Corporal Jenkins' behavior would obviously have been covered." Brief of Respondent, p. 6.

But the state ignores the rules regarding consent searches involving homes with multiple residents. It was uncontested the detached garage had been converted into an apartment for Mr. Truong and/or his girlfriend. *See* RP 37, 53-54, 92, -119-21, 159. Mr. Truong had at least common authority with his mother over the garage / apartment. Accordingly, his mother's consent to search the home, in general, had no bearing on Officer Jenkins's authority to search the garage because Mr. Truong was present and did not also consent. *See State v. White*, 141 Wn. App. 128, 136, 168 P.3d 459 (2007) (*citing State v. Morse*, 156 Wn.2d 1, 4-5, 123 P.3d 832 (2005)) ("Under Washington's constitution, one who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control"). Again, the state attempts to rely on a fact which is of no consequence to Mr. Truong's claimed error.

All of the facts necessary to adjudicate Mr. Truong's claimed error are in the record on appeal. This court should consider Mr. Truong's art. I, § 7 claim for the first time on appeal under RAP 2.5(a)(3). *Jones*, 163 Wn. App. at 359-60.

E. 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.

Mr. Truong relies on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Truong's convictions must be reversed for the reasons set forth above and in his Opening Brief.

Respectfully submitted on March 16, 2020,



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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:

John Truong/DOC#347578
Clallam Bay Corrections Center
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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:

Cowlitz County Prosecuting Attorney
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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 Seattle, Washington on March 16, 2020.



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Transmittal Information

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