

FILED  
Court of Appeals  
Division II  
State of Washington  
1/21/2020 2:54 PM

NO. 53412-6-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM WITKOWSKI,

Appellant.

---

---

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

The Honorable Michael Schwartz, Judge

---

---

BRIEF OF APPELLANT

---

---

JENNIFER L. DOBSON  
DANA M. NELSON  
Attorneys for Appellant

NIELSEN KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural History</u> .....	3
2. <u>Substantive Facts</u> .....	5
C. <u>ARGUMENT</u> .....	9
I. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE FRUITS OF THE ILLEGAL SEARCH OF WITKOWSKI'S RESIDENCE. ....	9
a. <u>Warrantless Searches are Per Se Unreasonable</u> ....	10
b. <u>The Heightened Protections Afforded to One's             Home Extend to the Curtilage</u> . ....	11
c. <u>A Warrantless Search Occurred When Police             Entered Witkowski's Property for the Purpose of             Obtaining Physical Information and Locating             Evidence</u> .....	13
d. <u>Police Did Not Have Valid Consent to Enter the             Curtilage and Search for Evidence of Utility             Theft</u> . ....	15
e. <u>Even If There Was Valid Consent to Enter the             Premises to Discuss the Alleged Utility Theft,             Officers Exceeded the Scope of that Consent</u> . ....	17
f. <u>The Drug and Firearm Evidence Should Have             Been Suppressed as Fruit of the Poisonous             Tree</u> . ....	19

**TABLE OF CONTENTS (CONT'D)**

	Page
II. WIKOWSKI'S CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES WAS VIOLATED WHEN POLICE FAILED TO PROCURE A SIGNED WRITTEN WARRANT BEFORE CONDUCTING A SEARCH OF HIS HOME. ....	21
D. <u>CONCLUSION</u> .....	25

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Afana</u> 169 Wn.2d 169, 233 P.3d 879 (2010) .....	24
<u>State v. Budd</u> 185 Wn.2d 566, 374 P.3d 137 (2016) .....	14, 16
<u>State v. Conway</u> 8 Wn. App. 2d 538, 438 P.3d 1235 (2019) .....	1
<u>State v. Cotton</u> 75 Wn. App. 669, 879 P.2d 971 (1994) .....	18
<u>State v. Davis</u> 86 Wn. App. 414, 937 P.2d 1110 (1997) .....	18
<u>State v. Eisfeldt</u> 163 Wn.2d 628, 185 P.3d 580 (2008) .....	11
<u>State v. Ettenhofer</u> 119 Wn. App. 300, 79 P.3d 478 (2003) .....	3, 21, 22, 23, 24
<u>State v. Ferrier</u> 136 Wn.2d 103, 960 P.2d 927 (1998) .....	2, 6, 15, 16, 17
<u>State v. Gaines</u> 154 Wn.2d 711, 116 P.3d 993 (2005) .....	11, 19
<u>State v. Garvin</u> 166 Wn.2d 242, 207 P.3d 1266 (2009) .....	10
<u>State v. Mayfield</u> 192 Wn.2d 871, 434 P.3d 58 (2019) .....	11
<u>State v. Morse</u> 156 Wn.2d 1, 123 P.3d 832 (2005) .....	21

## TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. O'Neill</u> 148 Wn.2d 564, 62 P.3d 489 (2003) .....	15
<u>State v. Ross</u> 141 Wn.2d 304, 4 P.3d 130 (2000) .....	10, 12
<u>State v. Schultz</u> 170 Wn.2d 746, 248 P.3d 484 (2011) .....	11, 16
<u>State v. Smith</u> 165 Wn. App. 296, 266 P.3d 250 (2011).....	19
 <u>FEDERAL CASES</u>	
<u>Florida v. Jardines</u> 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).....	11-14, 18
<u>Oliver v. United States</u> 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).....	10
<u>Schneckloth v. Bustamonte</u> 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....	15, 16
<u>Segura v. United States</u> 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984).....	19
<u>State v. Bustamante–Davila</u> 138 Wn.2d 964, 983 P.2d 590 (1999) .....	15, 18
<u>United States v. Dunn</u> 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).....	12
<u>United States v. Jones</u> 565 U.S. 400 (2012).....	13
<u>United States v. Lundin</u> 817 F.3d 1151 (9th Cir. 2016).....	13

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>United States v. Moon</u> 513 F.3d 527 (6th Cir. 2008) .....	15
<u>Wong Sun v. United States</u> 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	19

**RULES, STATUTES AND OTHER AUTHORITIES**

3 Wayne R. LaFave <u>Search and Seizure</u> § 8.1(c) (2d ed. 1987) .....	18
Charles W. Johnson & Debra L. Stephens <u>Survey of Washington Search and Seizure Law: 2019 Update</u> 42 SEATTLE U. L. REV. 1277 (2019) .....	11
CrR 2.3.....	23, 24
RCW 9A.61.030 .....	4
RCW 9A.61.040 .....	4
RCW 9A.61.050 .....	4
RCW 10.79.040.....	23
U.S. Const. amend. IV .....	10
Const. art. 1, § 7.....	1, 3, 10, 11, 13, 15, 17, 21, 23, 24

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not suppressing the fruits of a warrantless search where there was not valid consent.

2. Appellant's constitutional rights under Washington Constitution article 1, section 7 were violated when police failed to procure a signed written warrant before searching appellant's property for the evidence eventually used to convict him.

3. The trial court erred when entering the following findings and conclusions of law<sup>1</sup>:

a. "Undisputed Facts" 7 (to the extent it suggests the officer's purpose to go onto appellant's property was only to speak with the residents);<sup>2</sup>

b. "Findings of Disputed Facts" 1-5; and

c. "Reasons for Admissibility or Inadmissibility of the Evidence" 2-4, 6-7, 9,15-17.

Issues Pertaining to Assignments of Error

1. Police arrived at appellant's home intending to both talk to the residents and to search for evidence regarding utility theft. A utility employee claimed to have seen a stolen power meter

---

<sup>1</sup> The trial court's written findings and conclusions are attached as Appendix A.

<sup>2</sup> This finding is mislabeled as an "Undisputed Fact." The record shows the officer's purpose in going to the property was in dispute. 2RP 25-75. Mislabeled findings are treated for what they actually are and reviewed accordingly. State v. Conway, 8 Wn. App. 2d 538, 552, n. 8, 438 P.3d 1235 (2019).

attached to the property's power pole twenty days earlier. An occupant met police at the locked, gated entrance after being motioned over there by police. She was informed police were there to speak with the occupants about utility theft. No Ferrier<sup>3</sup> warnings were given. The occupant did not expressly consent to entry, but she unlocked the gate and stepped back as police came through the gate. The power pole could not be seen from the entrance. Upon entry, police immediately proceeded across the property to the power pole. They never asked the occupant if they could proceed further into the property to look at the power pole. Once at the pole, police discovered the only meter there was assigned to the residence and was disconnected. Power was being supplied by a generator. After seeing this, police suspected the stolen power meter was hidden elsewhere on the property and sought a warrant to search the house and cars a few days later. While searching appellant's house pursuant to that warrant, police discovered evidence suggesting there might be illegal drugs and firearms on the premises. Police obtained a second warrant. Pursuant to the second warrant, they discovered numerous firearms and controlled substances and appellant was charged in light of that discovery.

---

<sup>3</sup> State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

Appellant moved to suppress this evidence as fruit of an illegal search, but his motion was denied. Did the trial court err when it failed to suppress this evidence as fruit of an illegal search?

2. In State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003), this Court concluded officers act without authority of law for purposes of Washington Constitution article I, section 7 when they do not procure a signed written search warrant before conducting a search for evidence. The record in this case establishes the telephonic warrant permitting police to search for controlled substances and firearms was not signed by the judge until several days after the search was conducted. Was the search unconstitutional?

B. STATEMENT OF THE CASE

1. Procedural History

On November 2, 2015, the Pierce County prosecutor charged appellant William Witkowski with three counts of unlawful possession of a firearm in the first degree, three counts of unlawful possession of controlled substances (two with intent to deliver), and one count of defrauding a public utility in the first degree. CP 1-3. The information was later amended, with the prosecutor adding

seven counts of possession of a stolen firearm and nine more counts of unlawful possession of a firearm. CP 159-69.

A trial was held in May 2019.<sup>4</sup> 3RP 1.<sup>5</sup> Prior to sending the case to the jury, the charge for defrauding a public utility in the first degree (count VI) was downgraded to defrauding a public utility in the third degree (a gross misdemeanor) due to the State's failure to prove the requisite value supporting the greater offense.<sup>6</sup> 3RP 847. A jury found Witkowski guilty on all counts. CP 238-60.

Witkowski's standard range for the felonies was calculated to be 1,558 – 2,064 months. 3RP 924. The trial court found this to be clearly excessive and reduced the total sentence to 404 months. 3RP 943; CP 290-310, 336-39. The trial court also imposed a 364-day suspended sentence for the misdemeanor count. CP 311-19. Witkowski appeals all of his convictions except for count VI. CP 325

---

<sup>4</sup> The case was stayed for a significant amount of time while the State appealed the trial court's suppression order. CP 48. The trial court had suppressed all the guns that were found in a locked safe, but this Court reversed. CP 131-54.

<sup>5</sup> The transcripts are referred to as follows: 1RP (8-3-16); 2RP (8-31-16); 3RP (5-2-19 to 5-31-19).

<sup>6</sup> Where the power stolen is shown to have a value exceeding \$500, it is a felony. RCW 9A.61.030 and .040. For values less than \$500, it is a gross misdemeanor. RCW 9A.61.050.

## 2. Substantive Facts

In late October 2015, Pierce County Sheriff Deputy Martin Zurfluh received a call from Detective Kyle Torgerson of the Puget Sound Auto Theft Task Force. 1RP 11; 3RP 651. Torgerson informed Zurfluh he believed Witkowski had a stolen red Rafter quad on his property and was stealing power. 1RP 12, 36. Based on this, Zurfluh called the power company to investigate and learned that the power had been shut off at Witkowski's residence for nonpayment. 1RP 13. He also learned that field technician James Fields had already started investigating power theft at that property. 1RP 14-15. Fields had gone to Witkowski's property on October 6, 2015 and reportedly saw a stolen power meter hooked up to the power pole.<sup>7</sup> 3RP 30-33. He returned later that day to find the stolen meter was gone. 3RP 244.

On October 26, 2015, Zurfluh decided to go to Witkowski's residence and investigate. 1RP 18-19. He met Fields on the street and reviewed power company records pertaining to the suspected utility theft. 1RP 40. Zurfluh's purpose for entering Wikowski's

---

<sup>7</sup> Power meters have unique serial numbers on them so the power company can bill the person associated with a particular meter for the power consumed through that meter. 1RP 17, 192.

property was to discuss theft of power, investigate any utility theft, and locate the stolen power meter. 1RP 18-19, 44, 48, 61, 113.

Witkowski shared a home with his girlfriend Tina Berven.<sup>8</sup> 2RP 6. The house, its driveway, and the adjacent area (including the power pole) were enclosed by a 6-8 foot cedar fence. 1RP 142; 3RP 272, 350, 745. There was a locked, gated entrance. 1RP 141, 143; 3RP 715. The power pole could not be seen outside the property due to the fence; or when standing at the gate, due to a building obstructing the view. 3RP 275, 550.

Zurfluh and two deputies approached the front gate. 1RP 81. Fields remained by his truck. 3RP 279-80. Zurfluh motioned Berven to come over to the gate and told her that she needed to talk to him about stolen power allegations. 1RP 20. Berven was visibly upset by this and crying. 1RP 21, 50, 90-91. Officers sought entry on the property, but no Ferrier warnings were given to Berven. 1RP 48. Berven unlocked the gate in response to Zurfluh's request to enter and discuss the matter. 1RP 110. Berven believed she had no choice but to let them in. 1RP 157. Zurfluh assumed he had permission to enter by virtue of Berven unlocking and opening the gate, and he did so with the other

---

<sup>8</sup> The utility bill was in Berven's name. 1RP 14.

deputies. 1RP 21,124. Zurfluh invited Fields to join them. 3RP 280.

Without asking Berven's specific permission to inspect the power pole, Zurfluh immediately went with the others across the property to the power pole so he could determine if there was an illegal connection. 1RP 22, 49, 151; 3RP 280, 745. Zurfluh observed a generator hooked up and providing an independent source of power.<sup>9</sup> 1RP 23. There was a disconnected meter sitting at the bottom of the power pole, but it was the one assigned to the residence. 1RP 23. There was no stolen power meter at the pole. 1RP 23, 57. This led Zurfluh to believe it was located elsewhere on the premises. 1RP 57, 79.

Meanwhile, Witkowski had emerged and was kept at the front porch of the house by one of the deputies. 1RP 22. Zurfluh spotted a quad that fit the description of the one that was reported stolen. 1RP 27-28. He asked Witkowski for consent to check the serial number on the quad. 1RP 28. Witkowski gave consent, explaining the quad had been given to him to hold as collateral for a

---

<sup>9</sup> Berven explained that they had been using the generator for months because they had a billing dispute with the power company and chose to use an alternate source of power rather than pay an unfair bill. 1RP 143, 147-48, 162.

debt. 1RP 94. Police determined the quad was stolen, had it towed off the premises, and left. 1RP 30; 2RP 10.

Having confirmed the stolen power meter was not at the power pole, Zurfluh used this information to obtain a warrant to search Witkowski's residence to locate a stolen power meter. 1RP 57, 79-80; State's Response to Defendant Motion to Suppress, at Appendix A. On October 27, 2015, he obtained a search warrant authorizing police to search Witkowski's house and cars for a stolen power meter. 1RP 34, 67; State's Response to Defendant Motion to Suppress, at Appendix A.

On October 29, 2015, officers arrived at 8:30 in the morning and began their search. 1RP 33. During the search of the residence, officers noted drug paraphernalia, shotgun shells, and a gun safe. 1RP 34, 70-71, 103. The officers stopped their search while Zurfluh obtained a second warrant to search for evidence of controlled substance and firearm offenses. 1RP 34-35, 73.

Zurfluh applied for a telephonic warrant. 1RP 74. Later, during a suppression hearing, he explained the process as follows: an officer calls the judge, the officer reads the warrant affidavit, the judge approves the warrant, the warrant is served, and later the officer has the judge sign the warrant when it is filed. 1RP 74-75.

In this case, the warrant was authorized on October 29 -- the same day it was executed. 1 RP 75. However, the warrant was not signed by the judge until November 2. State's Response to Defendant Motion to Suppress, at Appendix B.<sup>10</sup>

Pursuant to the authority granted in the second warrant, police discovered several firearms in the gun safe and elsewhere on the property. 1RP 75-76; 3RP 659. Seven of the guns were later determined to be stolen. 3RP 336, 738. Police also discovered heroin, methamphetamine, oxycodone, and evidence consistent with drug dealing in a BMW parked at the residence. 1RP 76, 108.

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE FRUITS OF THE ILLEGAL SEARCH OF WITKOWSKI'S RESIDENCE.

The warrantless search of Witkowski's residence conducted by police on October 26, 2015 does not fall within one of the narrowly guarded exceptions to the constitutional warrant requirement. As explained below, the record falls to establish police obtained Berven's voluntary consent to search the curtilage for evidence of utility theft. The evidence used to support the

---

<sup>10</sup> This second warrant is attached to this brief as Appendix B.

convictions in this case derived from this initial illegal search. Hence, this evidence should have been suppressed as fruit of the poisonous tree.

a. Warrantless Searches are Per Se Unreasonable.

The Fourth Amendment protects people from unreasonable searches of their persons, houses, papers, and effects. U.S. Const. amend. IV; Oliver v. United States, 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The Washington Constitution affords even broader protections, providing: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. 1, § 7.

A warrantless search is unreasonable per se under the Fourth Amendment and article I, section 7 unless an exception applies. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State bears the heavy burden of establishing by clear and convincing proof a search falls within one of the few narrowly drawn exceptions to the warrant requirement. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). If it does not, the exclusionary rule applies, requiring evidence obtained and derived from an illegal search be suppressed as fruit of the poisonous tree. State v.

Gaines, 154 Wn.2d 711, 716-17, 722, 116 P.3d 993 (2005). Washington’s application of the exclusionary rule is broader than federal application. Indeed, Washington’s exclusionary rule “is nearly categorical.” State v. Mayfield, 192 Wn.2d 871, 888, 434 P.3d 58 (2019) (internal quotes and citation omitted).

b. The Heightened Protections Afforded to One’s Home Extend to the Curtilage.

Under both the Fourth Amendment and article I, section 7, a citizen’s home receives heightened protections. Florida v. Jardines, 569 U.S. 1, 6-7, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); State v. Eisfeldt, 163 Wn.2d 628, 634–35, 185 P.3d 580 (2008); see also, Charles W. Johnson & Debra L. Stephens, Survey of Washington Search and Seizure Law: 2019 Update, 42 SEATTLE U. L. REV. 1277, 1284-85 (2019). When it comes to constitutional protections against searches, “the home is first among equals.” Jardines, 569 U.S. at 6; see also, Eisfeldt, 163 Wn.2d at 634–35, (recognizing the same). As the Washington Supreme Court has recognized, “The right not to be disturbed in one’s home by the police without authority of law is the bedrock principle upon which our search and seizure jurisprudence is grounded.” State v. Schultz, 170 Wn.2d 746, 757, 248 P.3d 484 (2011).

Curtilage is considered part of the home and is placed under the home's "umbrella" of heightened constitutional protection. Jardines, 569 U.S. at 6–7; State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Curtilage consists of the area "immediately surrounding and associated with the home." Jardines, 569 U.S. at 6–7. For example, a fenced and locked backyard immediately adjacent to the house has been recognized as within the home's curtilage.<sup>11</sup> United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987).

Washington law recognizes a distinction between open and closed curtilage, with a lower expectation of privacy where a home's curtilage is open to the public. Johnson and Stevens, supra, at 1228. This distinction is irrelevant in the case, however, because the area of curtilage intruded upon was not impliedly open to the public. It was adjacent to the home, enclosed by a 6 to 8-foot cedar fence, and the gated access was locked. 1RP 142-44; 3RP 715. Members of the public, such as Girls Scouts and trick-or-treaters, would understand that the presence of the locked gate meant they were not invited onto the property beyond that point. See, Jardines, 569 U.S. at 8 (indicating that a determination of what

---

<sup>11</sup> Both the State and trial court correctly recognized that the area at issue here was curtilage. 2RP 38, 59.

area is impliedly open to the public should be derived from ordinary customs such as those recognized as Girls Scouts or trick-or-treaters).

Given that the area at issue here was curtilage closed to the public, the constitutional protections against unreasonable searches were at their apex. Thus, the State's burden to justify the warrantless search that occurred on October 26 is a particularly heavy one.

c. A Warrantless Search Occurred When Police Entered Witkowski's Property for the Purpose of Obtaining Physical Information and Locating Evidence.

The State argued below that police did not conduct a search on October 26; instead, they merely observed what was in plain view. 2RP 57. Neither the facts nor the law supports this claim.

Under the Fourth Amendment, a "search" occurs when police officers either infringe an individual's reasonable expectation of privacy or physically occupy private property for purposes of obtaining information. United States v. Jones, 565 U.S. 400, 408 n.5 (2012); Jardines, 569 U.S. at 5; United States v. Lundin, 817 F.3d 1151, 1158 (9th Cir. 2016). Likewise, under article I, section 7, a search occurs when officers enter the home with the intent of

finding incriminating evidence. State v. Budd, 185 Wn.2d 566, 576, 374 P.3d 137 (2016).

The facts of this case establish that a warrantless search occurred when Zurfluh entered Witkowski's curtilage for the purpose of obtaining information and finding physical evidence pertaining to utility theft. Zurfluh testified numerous times that the purpose of his presence at Witkowski's home on October 26 was (1) to speak with Berven and Witkowski about the alleged utility theft and (2) to obtain information and locate physical evidence establishing utility theft.<sup>12</sup> 1RP 18-19, 44, 48-49, 61, 63, 113. Indeed, as soon as officers were admitted through the gate, they walked over to the utility pole (without asking Berven's permission) to inspect it and look for the stolen power meter. 1RP 22, 49, 151; 3RP 280. This constituted a warrantless search under both federal and state law. Jardines, 569 U.S. at 5; Budd, 185 Wn.2d at 576.

---

<sup>12</sup> The trial court found Zurfluh did not go to the property to conduct a search but instead merely went to speak to Witkowski and Berven. Appendix A at 2, 6. It even made a finding that Zurfluh's testimony that he was not there to conduct a search was credible. Appendix A at 6. The record belies this, however. Zurfluh unequivocally stated and repeatedly affirmed one of his purposes in seeking entry to the premises was to search for evidence of utility theft. 1RP 18-19, 44, 48-49, 61.

d. Police Did Not Have Valid Consent to Enter the Curtilage and Search for Evidence of Utility Theft.

A police officer does not violate the Fourth Amendment or article 1, section 7 when the officer conducts a search pursuant to free and voluntary consent. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Ferrier, 136 Wn.2d at 111. However, the government bears the burden of proving any consent to search is given voluntarily. Schneckloth, 412 U.S. at 218; State v. Bustamante–Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999).

Consent is voluntary when it is “unequivocal, specific and intelligently given, uncontaminated by any duress or coercion.” United States v. Moon, 513 F.3d 527, 537 (6th Cir. 2008). When determining whether a person gave unequivocal, specific, and intelligent consent to a search, courts must consider the totality of the circumstances. Schneckloth, 412 U.S. at 227; State v. O’Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

One factor to be considered is whether police informed the person from whom consent is sought that he or she may lawfully refuse to consent to the search, may revoke the consent that they give, and may limit the scope of the consent. Ferrier, 136 Wn.2d at

118. Under federal law, the absence of such warnings is but one factor considered in the totality-of-the-circumstances analysis. Schneckloth, 412 U.S. at 248–49. Under Washington law, the failure to provide Ferrier warnings prior to entering the home during a “knock and talk” vitiates any consent given thereafter. Budd, 185 Wn.2d at 573.

A “knock and talk” is an investigative procedure where officers who have not yet secured a warrant request to enter a home for the purpose of conducting a search. Shultz, 170 Wn.2d at 759. The Washington Supreme court has concluded “knock and talks” are inherently coercive to some degree. Ferrier, 136 Wn.2d at 115-19. It explained:

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

Id. at 115. Thus, Ferrier warnings are necessary to ensure that citizens waive their constitutional right only after giving informed and meaningful consent to a search. Schultz, 170 Wn.2d at 758.

The record establishes Zurfluh was engaged in a “knock and talk” but did not provide Berven Ferrier warnings before entering. As discussed above, Zurfluh’s own testimony establishes he approached the premises and sought Berven’s consent to enter the curtilage for the purpose of conducting a search for evidence of utility theft. Regardless of whether he was also there to discuss the matter with Berven and Witkowski, the fact remains he sought to search the property for evidence of a crime.

This was a classic “knock and talk,” and Ferrier warnings were thus required. Zurfluh admitted he did not give Ferrier warnings to Berven before entering. 1RP 64. Hence, any consent Berven may have given was vitiated, and the search was illegal under article 1, section 7.

- e. Even If There Was Valid Consent to Enter the Premises to Discuss the Alleged Utility Theft, Officers Exceeded the Scope of that Consent.

Even if this Court concludes Berven validly consented to entry onto the property for the purpose of discussing the utility theft allegation, Zurfluh exceeded the scope of this consent when he moved deeper into the curtilage for the purpose of personally inspecting the power pole. Thus, any information police gathered by inspecting the power pole was the product of an unlawful

search.

A consensual search may go no further than the limits for which the consent is given. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). Exceeding the scope of consent is comparable to exceeding the scope of a search warrant. State v. Davis, 86 Wn. App. 414, 423, 937 P.2d 1110 (1997).

When law enforcement officers rely on consent as a basis to conduct a warrantless search, they have only the authority that has been granted to them by the consentee. 3 Wayne R. LaFare, Search and Seizure § 8.1(c), at 160 (2d ed. 1987). The scope of an implied consent to enter one's property "is limited not only to a particular area but also to a specific purpose." Jardines, 569 U.S. at 9; see also, State v. Cotten, 75 Wn. App. 669, 679, 879 P.2d 971 (1994) (discussing the limitations on the scope of consent).

Zurfluh exceeded the scope of any consent Berven may have given to enter. The trial court entered a finding that established police "were not on the property to search but rather to talk with the occupants regarding the theft of power." Appendix A at 6. Should this Court conclude this finding of fact is supported by the record (which Witkowski disputes), then it must find the officers exceeded the scope of Berven's consent. Berven consented only

to Zurfluh's request to enter for the specific and limited purpose of discussing the alleged power theft. Zurfluh's movement away from the entrance and across the property to physically examine the power pole exceeded the scope of his license to be on the property. Consequently, any evidence or information gathered at the power pole was illegally obtained and should have been suppressed.

f. The Drug and Firearm Evidence Should Have Been Suppressed as Fruit of the Poisonous Tree.

Evidence derived from illegal searches is subject to suppression under the exclusionary rule. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963); Gaines, 154 Wn.2d at 716–17. Derivative evidence will be excluded unless it was obtained without exploiting the original illegality or by means sufficiently distinguishable to be purged of the primary taint. State v. Smith, 165 Wn. App. 296, 309, 266 P.3d 250 (2011). This rule is known as the “fruit of the poisonous tree doctrine.” Segura v. United States, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984).

Where a defendant seeks suppression of derivative evidence, it is the State's burden to establish the taint has been purged. Smith, 165 Wn. App. at 309. It cannot do so here.

The drug and gun evidence used to convict Witkowski was derived from the illegal search conducted on October 26. The record establishes Zurfluh exploited the information he learned during police inspection of the utility pole on October 26 and used it to procure a search warrant to search Witkowski's house and cars to locate a stolen power meter. 1RP 57, 79-80; State's Response to Defendant Motion to Suppress, at Appendix A. As such, this search warrant was tainted by the illegality of the October 26 search.

The second warrant was also tainted. While searching for the stolen power meter under the tainted warrant, police saw items suggesting drug and firearm offenses. 1RP 67-70. Officers stopped their search, and Zurfluh sought authorization to search the premises and vehicles for illegal drugs and firearms. 1RP 73-75. Zurfluh would have been in no position to broaden the scope of the search to include these items had police not been acting under the search warrant authorizing them to look for the stolen power meter. Thus, the second search warrant was also tainted with that initial illegality.

It was while executing the second search warrant that officers discovered the controlled substances and firearms in

Witkowski's home and car. 1RP 76. Since this evidence derived from the illegal search on October 26, it should have been suppressed under the exclusionary rule. Consequently, this Court should hold the trial court erred in not suppressing the evidence, and all convictions except for count VI should be reversed.

II. WIKOWSKI'S CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES WAS VIOLATED WHEN POLICE FAILED TO PROCURE A SIGNED WRITTEN WARRANT BEFORE CONDUCTING A SEARCH OF HIS HOME.

The evidence obtained pursuant the second search warrant should be suppressed because officers did not have lawful authority at the time the search pursuant to that warrant was conducted. Specifically, police did not possess a signed written warrant authorizing them to search for drugs and firearms. Thus, they were acting without authority of law when they discovered this evidence.

The requisite "authority of law" contemplated in article 1, section 7 is generally a search warrant. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). When a search warrant is relied upon as authority to search, this Court has concluded that article 1, section 7 substantively requires police procure a signed written warrant before searching a home. Ettenhofer, 119 Wn. App. at

308-09.

In Ettenhofer, the search was deemed unconstitutional because police failed to get a sign written warrant. Ettenhofer, 119 Wn. App. at 302. There, a Lewis County sheriff's deputy procured a telephonic warrant to search the home of John Ettenhofer. Id. at 301. Before approval of the warrant and during a telephone call, the judge administered the witness oath to the deputy, and the deputy testified to the factual basis supporting probable cause. Id. The judge found probable cause and authorized a search. Id. However, the judge never signed a written warrant. Id. Ettenhofer challenged his conviction on appeal on the basis that nobody executed a written search warrant, the judge did not affix his signature to the warrant, and the deputy failed to give Ettenhofer a copy of the warrant. Id. 304-05.

This Court reviewed whether the procedures used by the deputy and judge violated CrR 2.3,<sup>13</sup> RCW 10.79.040,<sup>14</sup> and most importantly article I, section 7 of the Washington State Constitution. It concluded that the signed written warrant requirement in CrR 2.3 is an aspect of the constitutional authority. Id. at 308. It specifically rejected the State's claim that the signed written warrant requirement found in CrR 2.3 was merely ministerial in nature. Instead, this Court found this requirement to be substantive in nature, concluding the telephonic warrant was constitutionally deficient and the evidence derived from the search should have been suppressed. Id.

As in Ettenhofer, the record here shows the second warrant was constitutionally deficient. The telephonic procedure employed

---

<sup>13</sup> CrR 2.3(c) provides in relevant part:

If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched.

<sup>14</sup> RCW 10.79.040(1) provides:

It shall be unlawful for any police officer or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

(emphasis added).

in this case did not comply CrR 2.3(c)'s requirement that there be a signed written warrant at the time of the search. The face of the warrant shows the judge did not sign the written warrant until November 2, 2015 – several days after the search. Appendix B. There is nothing on the face of the document or elsewhere in the record indicating the judge had authorized someone else to affix his signature to the warrant before the search took place. In fact, the warrant seems to manifest the standard telephonic practice attested to by Zurfluh whereby police simply conduct the search without a signed warrant and wait until they file the warrant to get a signature. 1RP 75. This clearly does not comply with Washington's signed written warrant requirement as set forth in CrR 2.3(c).

Because compliance with CrR 2.3's signed written warrant requirement is a substantive requirement for purposes of article I, section 7, the telephonic procedure employed here and consequent search violated Witkowski's rights under Washington's constitution. The search for drugs and guns at Witkowski's residence was without authority of law. Thus, the remedy is to suppress this evidence. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); Ettenhofer, 119 Wn. App. at 309. Because all convictions

except count VI necessarily relied on this evidence, this Court should reverse those convictions.

D. CONCLUSION For reasons stated above, this Court should reverse all of appellant's convictions except for count VI.

DATED this 21<sup>st</sup> day of January, 2019.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in cursive script that reads "Dana M. Nelson for". The signature is written in black ink and is positioned above a horizontal line.

JENNIFER L. DOBSON, WSBA No. 30487

DANA M. NELSON, WSBA No. 28239

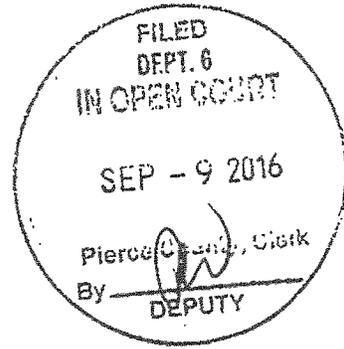
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX A**



15-1-04375-9 47582490 FN 09-15-16



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO.: 15-1-04375-9

vs.

WILLIAM HOWARD WITKOWSKI,

FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE CrR  
3.6

Defendant.

THIS MATTER having come on before the Honorable Jack Nevin on the 31<sup>st</sup> day of August, 2016, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

1. On October 26, 2015, Deputy Martin Zurfluh contacted Kenneth Klotz, the general manager of OHOP Mutual Light Company. OHOP is a public utility providing light and power to customers.
2. Klotz told Zurfluh that power had been turned off to the property at 31717 47<sup>th</sup> Avenue E. in Eatonville, WA in May of 2015 for non-payment. According to Klotz, the bill for services to the property was in the name of Tina Berven and William Witkowski also lived at the property.
3. Ms. Berven and Mr. Witkowski had lived together at the property since approximately November, 2014.

40

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25
4. Klotz told Zurfluh that the total cost of the stolen power, including the cost of the meter and service calls was over \$8,000.
  5. Klotz also informed Zurfluh that an OHOP field technician, James Field, had gone to the property on October 6, 2015. While on the property, Field saw the power meter assigned to the property on the ground at the base of the power pole. A different meter had been placed on the power pole. Field took photographs and field notes which he provided to Deputy Zurfluh. Field left the property to research the meters. The meter that had replaced the original power meter at the property was found to be stolen. Eventually the stolen meter was traced to a residence approximately two miles away from Berven and Witkowski's residence.
  6. Field went back to the property. When he returned, the original power meter was still at the base of the pole. The stolen power meter, however, had been removed and was nowhere in sight.
  7. After speaking with Klotz, Deputy Zurfluh went to the property with two other deputies and James Field. The purpose for going to the property was to speak with Berven and Witkowski about the theft of power and the stolen power meter.
  8. Deputy Zurfluh arrived at the property first. Zurfluh drove past the property to a cul de sac and noticed that the main gate to the property was open. Deputy Zurfluh saw Berven drive up to the property, get out and get the mail.
  9. As he drove past the property, Deputy Zurfluh also noticed a black Ford pick up truck with no license plates.
  10. After the other deputies and Mr. Field arrived, they went to the property. The gate to the property was now closed and locked. The deputies parked their vehicles outside the gate.

1 Ms. Berven came out of the residence and approached the deputies at the gate. Deputy  
2 Zurfluh told Ms. Berven why they were there and that they needed to speak with her and  
3 William (Witkowski) about the power meter and theft of power.

4 11. Deputy Zurfluh did not repeatedly ask Ms. Berven for permission to come on to the  
5 property.

6 12. Ms. Berven was not placed in handcuffs or otherwise detained.

7 13. Once on the property, Deputy Zurfluh and Ms. Berven walked over to the power pole  
8 which was located in the center of the property.

9 14. Ms. Berven called for Witkowski who came out of a shed on the property, walked past  
10 Ms. Berven and the deputies and on to the front porch. Witkowski did not raise an  
11 objection to the deputies being on the property nor did he ask them to leave.

12 15. Deputy Zurfluh noticed that there was no power meter on the pole, rather a generator was  
13 hooked up with vice grips and appeared to be providing power to the property. The  
14 original power meter was at the base of the power pole. The stolen power meter was  
15 nowhere to be seen.

16 16. While standing at the power pole, Deputy Zurfluh observed a red and black quad inside  
17 of a tent like structure which was partially open. Prior to going out to the property,  
18 Deputy Zurfluh had received information from Detective Torgerson of the Auto Theft  
19 Task Force that Witkowski possibly had a stolen quad on his property. The quad inside  
20 the tent structure matched the description of the quad from Detective Torgerson.

21 17. Detective Torgerson did not ask Deputy Zurfluh to go to the property, he was merely  
22 passing on intel.  
23  
24  
25

18. Zurfluh contacted Witkowski on the front porch and told him why they were there.

1 Witkowski was not placed in handcuffs or otherwise detained.

2  
3 19. While on the front porch, Zurfluh asked Witkowski about the black Ford pickup with no  
4 license plate. Witkowski told Zurfluh that within the past two weeks, someone had come  
5 on to the property and stolen the plates.

6 20. Zurfluh also asked Witkowski about the quad that was parked in the canvas tent structure.  
7 Zurfluh asked Witkowski for permission to check the serial number on the generator as  
8 well as the vehicle identification numbers (VINs) on the pick up and the red and black  
9 quad.

10 21. Ms. Berven told Deputy Zurfluh that the generator and quad had been given to  
11 Witkowski by Leroy Brandt as repayment for a \$1,000 debt. Witkowski confirmed Ms.  
12 Berven's statements. Witkowski also told Zurfluh that the black pickup truck with no  
13 plates belonged to or was registered to him.

14 22. When the deputies served the search warrant on October 29, 2015, there was a black  
15 BMW parked on the property. The BMW contained suspected heroin, a scale, suspected  
16 oxycodone pills, suspected methamphetamine and crib notes.

#### 18 THE DISPUTED FACTS

- 19 1. Deputy Zurfluh testified that Ms. Berven met the deputies at the gate and voluntary  
20 unlocked and opened the gate to the property, allowing the deputies and Mr. Field on to  
21 the property.
- 22 2. Ms. Berven testified that she saw Zurfluh's vehicle parked outside the gate from her  
23 kitchen window. She went out to the mailbox. At the time she went to the mailbox the  
24 gate was open. Berven locked the gate and went back inside the house.
- 25

- 1 3. Ms. Berven also testified that when she went back to the kitchen and looked out the  
2 window, she saw that Deputy Zurfluh had his arm over the gate trying to open it.
- 3 4. Ms. Berven testified that when she went out to the gate, Zurfluh told her that they were  
4 there to investigate theft of power and that she needed to open the gate or she would go to  
5 jail. Ms. Berven testified that she unlocked the gate and that Zurfluh pushed the gate  
6 open as she was stepping back.
- 7 5. Ms. Berven testified that one officer went in to the house, then later said that she didn't  
8 know if he went into the house.
- 9 6. Deputy Zurfluh testified that neither he nor any of the other deputies went inside the  
10 residence nor did they ask for consent to go into the residence to search for evidence of  
11 any criminal activity.
- 12 7. Ms. Berven testified that the "power guy" (James Field) was on his knees under the quad  
13 looking for serial numbers.
- 14 8. Ms. Berven testified that Witkowski was told to sit underneath a tree.
- 15 9. Deputy Zurfluh testified that prior to checking the serial number on the generator or the  
16 VINs on the quad and pick up truck, he advised Witkowski of *Ferrier* warnings,  
17 including that he had the right to refuse the search, limit the scope of the search and stop  
18 the search at any time. Witkowski gave him consent to check the serial number and  
19 VINs without restriction.
- 20 10. Ms. Berven and Mr. Witkowski both testified that the deputies did advise Witkowski that  
21 he had the right to refuse, limit or stop the search but only with respect to the black pick  
22 up truck and that Zurfluh did not advise Witkowski of those same rights with respect to  
23 the quad or generator.  
24  
25

11. Witkowski testified that he in fact agreed to the search of the pick up truck VIN and when Zurfluh asked if he minded if he checked the VIN, told Zurfluh, "No, go ahead."

FINDINGS AS TO DISPUTED FACTS

- 1. The Court finds Deputy Zurfluh's testimony regarding the initial contact with Ms. Berven at the gate to be credible. The deputies did not attempt to coerce, deceive or otherwise manipulate Ms. Berven's free will.
- 2. Ms. Berven not only opened the gate, she unlocked it of her own free will. Nobody, including the deputies, pushed the gate open.
- 3. The Court finds Deputy Zurfluh's testimony credible that the deputies were not at the property to search.
- 4. Ms. Berven's conduct in unlocking and opening the gate and stepping back sent a clear message inviting the deputies and Mr. Field on to the property.
- 5. The Court finds both defendants' testimony with respect to the contact with the deputies to be not credible particularly since both defendants testified that Witkowski gave valid consent to the search of the truck's VIN, the only non-incriminating item on the property.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

- 1. Ms. Berven had clear authority to allow the deputies on to the property as she lived on the property. The power bill for the property was in Ms. Berven's name alone.
- 2. This was not a knock and talk procedure, there *Ferrier* warnings were not required for entry onto the property. The deputies were not there to search but rather to talk with the occupants regarding the theft of power.
- 3. Ms. Berven's conduct sent a clear message, inviting the deputies and Mr. Field onto the property, therefore the entry on to the property was consensual.

125

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25
4. While legitimately on the property, the deputies were entitled to see what was there to be seen in plain view.
5. The observation of the red and black quad inside the tent structure was a plain view observation.
6. Mr. Witkowski consented to Deputy Zurfluh's request to examine the vehicles and generator in order to check the Vehicle Identification Numbers and the serial number on the generator. The deputies were not required to give *Ferrier* warnings prior to checking the VINs and serial number even though Deputy Zurfluh *Attempted to do so*.
7. The first search warrant was supported by adequate probable cause.
8. While searching the residence, deputies saw evidence of other criminal activity including controlled substances (contraband), 2 gun safes, ammunition for firearms and evidence of identity theft/fraud.
9. The addendum to the original search warrant was also supported by adequate probable cause.
10. The search warrant addendum allowed for a search of the residence at 31717 - 47<sup>th</sup> Avenue E. in Eatonville. The search warrant also allowed for a search of a shed and outbuildings as well as any and all vehicles for evidence of unlawful possession of a firearm, identity theft, unlawful possession of a controlled substance and unlawful use of drug paraphernalia.
11. The search warrant identified the evidence to be search for including firearms and firearm accessories, controlled substances, items used as containers for surveillance equipment, drug paraphernalia and indicia of dominion and control.
12. The warrant did not include the guns safes or containers for firearms.

13. The search of the safe did not fall within the scope of the search warrant. The court does not accept the proposition that the gun safes are personal effects.

14. The evidence found inside the gun safes are suppressed.

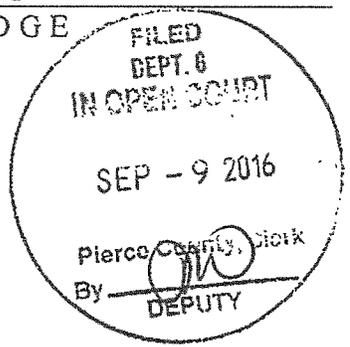
15. All other evidence found inside the residence and shed are admissible.

16. The evidence, including the controlled substances, found inside the BMW located on the property is admissible.

17. Evidence regarding the red and black quad as well as the generator is admissible.

DONE IN OPEN COURT this 9 day of September, 2016 .

*Jack Nevin*  
\_\_\_\_\_  
JUDGE  
JACK NEVIN



Presented by:

*Dione J. Hauger*  
\_\_\_\_\_  
Dione J. Hauger, WSB #25104  
Deputy Prosecuting Attorney

Approved as to Form:

*Dana Ryan*  
\_\_\_\_\_  
Dana Ryan, WSB #  
Attorney for Defendant

47

## **APPENDIX B**



Based on the above information, your affiant verily believes that the above evidence is concealed in or about a particular house, attached/unattached buildings, vehicle, person, place or thing, to wit:

- 31717 47th Ave E Eatonville, WA 98328. A brown manufactured home that has two windows with white trim facing south and a fully covered front porch attached to the west side of the residence.
- A brown, elevated shed located northeast of the main residence
- Any and all vehicles and outbuildings located on the property

Therefore, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or thing, and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felonies or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. A copy of this warrant shall be served upon the person or persons found in or on said house or place, and if no person is found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

*Authorized telephonically on Oct. 29th*  
GIVEN UNDER MY HAND this 29<sup>th</sup> day of October 2015. *DC*

*Jerry Costecco*  
\_\_\_\_\_  
PIERCE COUNTY SUPERIOR COURT JUDGE

*JERRY COSTECCO*  
*signed on 11/2/15*

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**January 21, 2020 - 2:54 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53412-6  
**Appellate Court Case Title:** State of Washington, Respondent v William Witkowski, Appellant  
**Superior Court Case Number:** 15-1-04375-9

**The following documents have been uploaded:**

- 534126\_Briefs\_20200121144640D2214227\_4077.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BOA 53412-6-II.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

**Comments:**

Copy mailed to: William Witkowski 714624 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326-

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20200121144640D2214227**