

FILED

FEB 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 283721

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

RYAN J. MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL McCARTHY, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

FILED

FEB 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 283721

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

RYAN J. MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL McCARTHY, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	2
III. <u>AARGUMENT</u>	2
1. The trial court did not err in denying the motion to suppress, as Ella Miller had authority to consent to the searches of the shed and camper.....	2
2. The marijuana found in the corn field was abandoned property	5
IV. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

PAGE

Cases

City of Pasco v. Shaw, 161 Wn.2d 450, 166 P.3d 1157 (2007),
cert. denied, 128 S.Ct. 1651 (2008)..... 3

State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995)..... 5

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) 3

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007) 6

State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005)..... 3

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002)..... 3, 5

State v. Leach, 113 Wn.2d 735, 782 P.2d 1035 (1989) 4

State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984)..... 3, 4

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005)..... 3, 4

State v. Mote, 129 Wn.App. 276, 120 P.3d 596 (2005)..... 3

State v. Mustain, 21 Wn.App. 39, 584 P.2d 405 (1978)..... 6

State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)..... 3

State v. Picard, 90 Wn.App. 890, 954 P.2d 336,
review denied, 136 Wn.2d 1021 (1998)..... 5, 6

State v. Vidor, 75 Wn.2d 607, 452 P.2d 961 (1969)..... 4

Supreme Court Case

United States v. Matlock, 415 U.S. 164, 39 L.Ed.2d 242,
94 S.Ct. 988 (1974) 4

TABLE OF AUTHORITIES (continued)

	PAGE
CONSTITUTIONAL PROVISIONS	
Article 1, § 7	2, 6
Fourth Amendment	6
Statutes	
RCW 69.50.101(p)	6
RCW 69.50.401(1)	6
Rules	
RAP 10.3(b)	2

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether undisputed evidence shows that that the warrantless search of the interior of a shed violated the defendant's constitutionally protected expectation of privacy?
2. Whether a person accused of possession of a controlled substance has standing to challenge the admissibility of evidence alleged to have been found in his possession?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The shed was not the property of the defendant, he lacked an expectation of privacy in it, and in any event he used it while assuming the risk that other individuals with authority over it could consent to a valid search.
2. A defendant has automatic standing to challenge a seizure if the charged offense involves possession as an essential element, but does not with respect to a charge of manufacturing a controlled substance, and the controlled substance was voluntarily abandoned.

II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Miller's opening brief. RAP 10.3(b). The following is a supplement to that narrative.

Deputy Tucker could observe the marijuana "shake", or fragments of marijuana leaves from outside the shed, as the door was open at the time of his initial observation. **(RP 25)**

Ms. Ella Miller owned the shed in question, and paid for the power supplied to the building. **(RP 70)** Ms. Miller testified that while she had sold the camper to her son Donald Miller, Jr., and that he had built the shed to house his tools, she had not transferred title in either property. **(RP 71)** No one lived in the shed. **(RP 72)**

III. ARGUMENT

1. The trial court did not err in denying the motion to suppress, as Ella Miller had authority to consent to the searches of the shed and camper.

Article I, s. 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington State Supreme Court has held that article I, section 7 provides greater protection of an individual's right to privacy than the Fourth Amendment to the United States Constitution.

State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002), *cited in* State v. Mote, 129 Wn. App. 276, 282, 120 P.3d 596 (2005).

It is well-established that Article, section 7's prohibition against warrantless searches is subject to a few well guarded exceptions. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). This constitutional protection is "at its apex 'where invasion of a person's home is involved.'" State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008), *quoting* City of Pasco v. Shaw, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), *cert.denied*, 128 S. Ct. 1651 (2008).

Unchallenged findings of fact entered after a suppression hearing are verities on appeal. Gaines, 154 Wn.2d at 716.

Miller is correct that the Washington Supreme Court has rejected an exception to the warrant requirement based upon "apparent authority" to consent: "while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7, we focus on expectations of the people being searched and the scope of the consenting party's authority." State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005).

However, consent to a search establishes the validity of that search if the person giving consent has the authority to so consent. State v.

Mathe, 102 Wn.2d 537, 541, 688 P.2d 859 (1984), *citing* State v. Vidor, 75 Wn.2d 607, 452 P.2d 961 (1969). Indeed, in Mathe the Washington Supreme Court adopted the so-called “common authority” standard for consent to search, described in United States v. Matlock, 415 U.S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974): “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.” Matlock, at 170, *quoted in* Mathe, 102 Wn.2d at 543.

There are two aspects to the common authority rule. First, a consenting party must be able to consent in his or her own right. Also, it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. Mathe, 102 Wn.2d at 543-44.

Because a person’s expectation of privacy is necessarily reduced when authority to control a space is shared with others, such persons necessarily assume some risk that others with authority to do so may allow outsiders in the shared areas. Morse, 156 Wn.2d at 7, *citing* State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989).

Here, there is no dispute that Donald Miller Jr. built the shed, but it was built on his mother’s property. It is apparent from the record that he did not lease or rent the building from her, and it was not used as a residence. His mother paid the power bill. Ella had actual authority to

consent to a search of the shed, and to the extent that that authority was shared with Donald Jr., her consent was valid against him.

Ryan, however, did not live on the premises, and had only recently received the key to the shed. The State would submit that he had no expectation of privacy in the shed, and in electing to use the shed, he did so with the assumption of the risk that either his father or grandmother could allow access to outsiders.

As the trial court's Conclusion of Law 1 provided that Ella had "both apparent and real authority" to consent to the search, it did not err.

2. The marijuana found in the corn field was abandoned property.

Miller asserts that he has automatic standing to challenge the seizures in question. It is true that a defendant has automatic standing if (1) charged with an offense that involves possession as an essential element; and (2) the defendant is in possession of the subject matter at the time of the search or seizure. Jones, 146 Wn.2d at 334. However, automatic standing does not apply if an offense does not involve possession as an "essential element, and where several crimes are charged, some of which do not involve possession, standing for each offense is determined separately. State v. Carter, 127 Wn.2d 836, 842-43, 904 P.2d 290 (1995); *see, also*, State v. Picard, 90 Wn. App. 890, 954 P.2d 336,

review denied, 136 Wn.2d 1021 (1998) (arson); State v. Mustain, 21 Wn. App. 39, 42, 584 P.2d 405 (1978) (larceny).

The State concedes that Mr. Miller had standing to challenge the seizure associated with Count 1, but incorporates the argument put forth in section 1 that he lacked an expectation of privacy in the shed.

Mr. Miller was charged in Count 2 with the offense of manufacture of a controlled substance. Possession is not an essential element of that offense. RCW 69.50.101(p); RCW 69.50.401(1). Automatic standing is not established as to that count.

Additionally, the bags of marijuana recovered from an adjacent property, after the Deputy followed a trail of marijuana “shake”, was abandoned property. Law enforcement may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or Article I, sec. 7 of the state constitution. State v. Evans, 159 Wn.2d 402, 408, 150 P.3d 105 (2007), (citations omitted). The issue in such cases is not abandonment in the strict property right sense, but whether the defendant, in leaving the property, has relinquished his expectation of privacy so that the search and seizure is valid. Id. By abandoning the bags on adjacent property, in the open, it is clear that the defendant so relinquished any right to privacy he may have had in them.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions on Count 1 and Count 2.

Respectfully submitted this 18th day of February, 2011.


Kevin G. Eilmes, WSBA No. 18364
Deputy Prosecuting Attorney
Attorney for Yakima County

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

STATE OF WASHINGTON,)	NO. 283721
)	
Respondent,)	SWORN STATEMENT OF SERVICE
)	BY MAIL
vs.)	
)	
RYAN J. MILLER,)	
)	
Appellant.)	

I, Elaine Chartrand, state that I am and was at the time of the service of the Brief Of Respondent, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 18th day of February, 2011, I served upon Janet G. Gemberling, 2920 S Grand Blvd PMB #132, Spokane, WA 99203-2530, Attorney for Appellant, and Ryan J. Miller, 404 West 4th Avenue, Apt 2, Toppenish, WA 98948 the appellant herein, a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Elaine Chartrand
February 18, 2011
at Yakima, WA