

FILED
Jan 17, 2014
Court of Appeals
Division III
State of Washington

NO. 31543-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HERBERT ELMER ELLSWORTH,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

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ARGUMENT

The State relies upon *State v. Lynd*, 54 Wn. App. 18, 771 P.2d 770 (1989), *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989), *review denied*, 113 Wn.2d 1036 (1989), *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994) and *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001) in support of its argument that Officer Hake's entry into the residence was authorized under the exigent circumstances/emergency exception to the search warrant requirement.

The State's reliance on these cases is misplaced. Officer Hake's entry was made without consent. In *State v. Raines, supra*, entry was consensual.

Officer Hake observed Ms. Cooper's mother arrive at the residence. He saw Ms. Cooper and her mother enter the residence. He approached and asked them to come outside. They did not do so. He then entered. At no time did he see Mr. Ellsworth.

In *State v. Johnson, supra*, Mr. Johnson was arrested outside the residence. The alleged victim came to the door and opened it for the officer who then entered the house.

In *State v. Menz, supra*, there was a 9-1-1 domestic violence call. When officers arrived no one answered an open door. It was a winter

night. The television set was on. They entered the residence.

Finally, in *State v. Lynd, supra*, the emergency exception was found to apply since the victim could not be located.

The State's attempt to distinguish *State v. Schultz*, 10 Wn.2d 746, 248 P.3d 484 (2011) fails. As outlined in Mr. Ellsworth's original brief, there were additional distinguishing factors over and above the raised voices. The *Schultz* Court determined that those additional factors were insufficient to authorize a warrantless entry into the residence.

The State also attempts to rely upon the protective sweep exception to the search warrant requirement. The reference to *State v. Hopkins*, 113 Wn. App. 954, 55 P.3d 691 (2002) does not support its argument. As set forth in his original brief, relying upon *State v. Sadler*, 147 Wn. App. 97, 125, 193 P.3d 1108 (2008), the protective sweep exception only applies while an officer is making a lawful arrest. Mr. Ellsworth was not present. He was not arrested.

Finally, the State asserts that there is no error as to the restitution issue. The original Judgment and Sentence, as supplied by the Grant County Superior Court Clerk to the Court of Appeals, indicates that a restitution figure is included in the Judgment and Sentence. The State filed a Supplemental Clerk's Paper indicating that the restitution figure had been

deleted by crossing it out. There is no record of this occurring in the transcripts provided to the Court of Appeals.

CrR 7.7(a) states, in part:

Clerical mistakes in judgments, ... and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

There was no record as to when the restitution figure was deleted from the Judgment and Sentence. It is uncertain whether it occurred prior to or after acceptance of review.

Whatever procedure was used, it does not appear that any record was made of when the change occurred.

Utilization of the procedure employed by the Court should be condemned and any error which still remains in the trial court record should be corrected.

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DATED this 17th day of January, 2014.

Respectfully submitted,

s/Dennis W. Morgan
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NO. 31543-6-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) GRANT COUNTY
 Plaintiff,) NO. 12 1 00066 5
 Respondent,)
) **CERTIFICATE**
 v.) **OF SERVICE**
)
 HERBERT ELMER ELLSWORTH,)
)
 Defendant,)
 Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 17th day of January, 2014, I caused a true and correct copy of the and *APPELLANT'S REPLY BRIEF* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

CERTIFICATE OF SERVICE

