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NOVEMBER 28, 2016
Court of Appeals
Division III
State of Washington

COA NO. 33933-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TORRES,

Appellant.

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

The Honorable Michael McCarthy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE POLICE OFFICER VIOLATED TORRES'S CONSTITUTIONAL RIGHT TO PRIVACY IN ENTERING THE HOUSE WITHOUT A WARRANT AND SEIZING HER.

As argued in the opening brief and addressed in further detail below, the record is sufficient to make the constitutional error manifest under RAP 2.5(a)(3). In the alternative, the record is sufficient to show defense counsel was ineffective in failing to bring a suppression motion. Cf. State v. Ortiz, __Wn. App.__, __P.3d__, 2016 WL 5947204, at *1 (slip op. filed Oct. 13, 2016) (trial counsel ineffective for failing to move to suppress for violation of knock and announce rule).

a. Deputy Reyna entered Torres's residence.

The State acknowledges Deputy Reyna went to the residential address listed on Torres's ID and was admitted by a person who "*also lived* in the house." Brief of Respondent (BOR) at 2-3 (emphasis added). But elsewhere the State complains the record does not show this residence was Torres's residence. BOR at 16. Shreves testified he found a driver's license. RP 119. Deputy Reyna testified he "took possession of the driver's license" and went to the address listed on the license, where he found Torres. RP 8, 155. The driver's license listing Torres's address is sufficient by itself to show it was her residence. RP 8-9; see RCW

46.20.161 (license must include "Washington residence address"). In fact, the State listed the residence at issue as Torres's address in the charging document. CP 3, 6. Torres had a bedroom in the house in which she slept. RP 9, 27. At the CrR 3.5 hearing, Torres agreed with counsel's question that Deputy Reyna "came to your house on July 7th." RP 27. The record clearly shows the house into which Deputy Reyna intruded was Torres's residence.

b. The young girl's apparent consent to enter the home was not binding on Torres under the common authority doctrine.

The State argues there is no definitive record of the age of the person who granted entry. BOR at 6. Deputy Reyna described her as a "young girl." RP 18. Torres testified the girl was under 18 years old. RP 30. The age of the girl is immaterial to Torres's argument because the validity of the girl's consent must be determined under the common authority doctrine.

The State cites to cases in support of its argument that a minor child is capable of consenting to police entry. BOR at 7-8 (citing State v. Jones, 22 Wn. App. 447, 452-53, 591 P.2d 796 (1979); State v. Cordero, 170 Wn. App. 351, 362-63, 284 P.3d 773 (2012)). Neither case involved the situation where a cohabitant of the consenting party was present and had equal or greater authority to control the premises. Neither case

involved the common authority doctrine under article I, section 7 and so they are inapposite.

Under the common authority doctrine, "[o]ne 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." State v. Morse, 156 Wn.2d 1, 4-5, 123 P.3d 832 (2005). The State contends nothing in the record indicates Torres had superior rights in relation to the girl. BOR at 6. The salient question, though, is whether Torres had at least equal authority to control the premises.

The record shows this was Torres's aunt's house. RP 29. Torres lived there. The record does not show the girl lived in the home. But even assuming the girl lived there, the record shows the girl was only the aunt's daughter-in-law. RP 29. The State surmises the girl lived upstairs, and points out the girl answered the door and led the officer to Torres's downstairs bedroom. BOR at 16. The State argues "the only conclusion that can be drawn from these facts is that [the girl] had at least co-equal rights in this residence." BOR at 16. Torres agrees the girl had co-equal rights. That's why Torres wins this appeal. A cohabitant with common authority cannot give consent that is binding upon another cohabitant with equal control over the premises when the nonconsenting cohabitant is actually present on the premises. Morse, 156 Wn.2d at 13. "When a

cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained." Id. at 15. Torres was present in the home. Deputy Reyna did not get her consent to enter. The girl's consent is not binding on Torres. The officer's physical intrusion into the house without a warrant cannot be justified under the consent exception to the warrant requirement.

c. The Terry stop exception to the warrant requirement is inapplicable because there is no such thing as a lawful Terry stop inside the home.

The State contends application of the Terry stop exception to a factual setting within the home would be an "enormous" and "totally uncalled for" expansion of the exception. BOR at 14. Torres agrees. As the State does not argue the Terry stop exception justified the police intrusion into Torres's home, there is no need to address the matter further.

d. The police officer seized Torres in her home without a warrant.

The State emphasizes that Deputy Reyna did not enter the house to search for evidence but rather to extract Torres from it. BOR at 2-3. The State does not explain why this makes a difference. The Fourth Amendment and article I, section 7 protect not only against warrantless searches but also warrantless seizures. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). And article I, section 7 focuses on the

disturbance of private affairs regardless of the reasonable of an officer's actions. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). From Torres's point of view, it makes no difference whether the officer was there to search her home or take her from it. She woke up to an officer on the threshold of her bedroom, directing her to come out. The intrusion into her home, the quintessential private affair, is complete at that point.

A seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." Harrington, 167 Wn.2d at 663 (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)).

The State argues "It is not a seizure where an officer *approaches an individual in public* and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away." BOR at 4 (emphasis added) (citing State v. Armenta, 134 Wn.2d 1, 11-12, 948 P.2d 1280 (1997)). Torres does not dispute this general proposition, but Deputy Reyna did not approach Torres in public. The officer approached her inside her home.

The fact that she was not placed under arrest until she was outside does not answer the question of whether she was seized before then. A

seizure that does not rise to the level of an arrest is unlawful if not justified by an exception to the warrant requirement. See Harrington, 167 Wn.2d at 664 ("If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality.").

Reyna testified he "walked her out" to his patrol car. RP 9. Reyna acknowledged taking her outside the home was his decision, not hers. RP 24. He testified at trial that he asked Torres to get up, told her why he was there, and "escorted" her outside to his patrol vehicle. RP 158. At the CrR 3.5 hearing, Reyna answered "okay" to the question "You grabbed her elbow and led her out of the house?" RP 19; see State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (show of authority constituting seizure includes "some physical touching of the person of the citizen."). Torres was asleep in her bedroom with her boyfriend when Reyna showed up at the doorway, knocked to wake her up, physically escorted her out of the house before she even had a chance to put her shoes on, and placed her in his patrol car to interrogate her. RP 9, 18-19, 24, 42, 157-58. Deputy Reyna seized Torres in removing her from her home.

Even if Torres was not seized, Deputy Reyna still physically invaded her home without lawful authority, which by itself is a constitutional violation. The "physical entry of the home is the chief evil

against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting United States v. U.S. District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)). "[A] citizen's privacy is most protected in his or her home, and any intrusion into the home without a warrant is per se unreasonable." State v. Hatchie, 161 Wn.2d 390, 397, 166 P.3d 698 (2007).

e. The exclusionary rule mandates suppression of the incriminating statements.

Torres's statements to the police officer must be suppressed under the exclusionary rule because they are the direct result of the officer's unlawful entry and seizure. The State offers no argument to the contrary, content to rest on its argument that the officer did nothing unlawful. BOR at 15. So no response is needed on this point.

f. Defense counsel was ineffective in failing to make a suppression motion.

The State contends trial counsel can legitimately decline to seek suppression if there is no valid ground for such a motion. BOR at 18. As argued, there is a valid ground for suppression. The State points to no legitimate trial strategy that would justify foregoing a valid suppression motion. The State does not dispute Torres's argument that there is a

reasonable probability the outcome of the trial would have been different had the suppression motion been made and granted.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Torres requests reversal of the convictions and correction of the judgment and sentence.

DATED this 29th day of November 2016

Respectfully Submitted,

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Re: Torres
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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11-28-2016
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Done in Seattle, Washington