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Court of Appeals
Division III
State of Washington

NO. 347877

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

PLAINTIFF/APPELLANT,

V.

DANIEL ADRON HESTER

DEFENDANT/RESPONDENT

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I. Statement of Facts

Respondent, Daniel Hester, owned the residence located at 23071 Hwy 20, Okanogan, WA. [CP 7:1] Respondent and Kerry Horton reached an agreement where Mr. Horton would reside in the house and would look after the property while Respondent resided in Maine. [CP 7:2-3; RP 15-16] Mr. Horton resided in the property by himself and no other occupants lived in the house for a number of months up until the incident in this case. [RP 16:14-22] Respondent never showed up at the house while Mr. Horton resided there. [RP 17:1-2]

Respondent had left Mr. Horton a specific list of items he could not use and areas he was not permitted to access. [RP 17:15- 18:13; CP 7:3-4] Respondent also left post-it notes on items that he did not want Mr. Horton to use. [CP 7:3-4; RP 18:5-13] Respondent told Mr. Horton that he could use anything in the house except for the items he had specifically listed or designated as off limits. [CP 7:3-4; RP 18:14-25] Mr. Horton did not access any areas that were off limits and did not use any items designated as off limits. [RP 19: 9-18]

One of the lights in the house burnt out so Mr. Horton went to the laundry room to get a replacement bulb. [RP 20:1-9] The laundry room was not designated as off limits. [RP 20:10-14; CP 7:6] The light bulbs

were not marked off limits. [RP 20:19-21:1] When Mr. Horton opened the light bulb box, two media storage devices (thumb drives) fell out. [RP 21:3; CP 7:6] Mr. Horton thought it was strange that the drives were in the box so he plugged one into his laptop and immediately saw what he described as “naked boys.” [CP 8:8; RP 21:4-12]

A couple days later, Mr. Horton reported what he had seen to the Okanogan County Sheriff’s Office and brought the thumb drives to Detective Rob Heyen. [CP 8:10; RP 22:1-11] Det. Heyen took control of the thumb drives, copied the contents onto his office computer, and viewed the contents of the thumb drives. [CP 8:11; RP 38:7-17] Det. Heyen did not seek a search warrant prior to viewing the contents of the drives. [CP 8:11; RP 38:21-23] Det. Heyen felt that since Mr. Horton had the right to be in the home and had the right to use the light bulbs since they had been found in a place that Mr. Horton could lawfully find them, that he did not need a warrant. [RP 39:2-8]

The next day, Det. Heyen went to the residence at 23071 Hwy 20 to obtain a recorded statement from Mr. Horton. [RP 39:10-13; CP 9:13] Det. Heyen knocked on the door and Mr. Horton allowed him into the house. [RP 39:17-19, 22:22-23] Mr. Horton asked Det. Heyen to come into the house. [RP 23:1-4] Nobody else was present at the home except for Mr. Horton. [RP 29:21] After interviewing Mr. Horton, Det. Heyen

took photos of the interior of the home with Mr. Horton's consent. [RP 40:7-8, 23:17-20; CP 9:15] Mr. Horton did not object to Det. Heyen walking around or taking photographs. [RP 40:11-16; CP 9:16] Det. Heyen did not access any areas that were designated as off limits by Respondent. [CP 9:16; RP 41:4-8] Det. Heyen noticed multiple computers in the house but did not access any of them. [RP 41:15-17]

Det. Heyen subsequently obtained a search warrant for the residence to further search and seize evidence. [RP 43:9-16; CP 11:24] Detective Kreg Sloan obtained a subsequent search warrant to search the contents of the seized computers. [CP 11:26] Evidence obtained through the viewing of the thumb drives and the warrant searches of the computers found in the home led to discovery of multiple images of purported child pornography.

II. Procedural History

Respondent was charged by Information in Okanogan County Superior Court Cause Number 14-1-00252-0 with Count 1- RCW 9.68.070 Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree and Count 2- RCW 9.68.070 Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree.

Respondent filed a motion to suppress evidence under CrR 3.6 on July 16, 2015. Appellant filed a response motion on August 13, 2015. The

suppression hearing was held on September 24, 2015. Kerry Horton, Dennis Carlton, and Detective Rob Heyen testified at the hearing. The trial court issued its ruling and associated Findings of Fact and Conclusions of Law on June 22, 2016. The trial court ruled that Respondent's expectation of privacy under article 1, section 7 of the Washington State Constitution and 4th Amendment to the US Constitution were violated by Det. Heyen's warrantless search of the thumb drives and warrantless search of the house. [CP 15:16-19] The trial court granted suppression of the contents of the thumb drives and all evidence seized from the house. [CP 15:19] This had the effect of terminating the State's case and the State filed a motion to dismiss the case as result of the suppression. [CP 1-4]

Respondent's motion to suppress raised multiple other issues including: whether there was probable cause for issuance of the search warrant; whether the search warrants listed items to be seized with sufficient particularity; whether Det. Sloan's warrant was timely executed; and whether Det. Heyen's search warrant satisfied *Aguilar-Spinelli*. The trial court did not issue rulings on any of these issues.

ASSIGNMENTS OF ERROR

I. Assignments of Error.

1. The trial court erred when it ruled that a search occurred within the meaning of article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution.
2. The trial court erred when it ruled that Mr. Horton did not have authority to grant consent to search the thumb drives.
3. The trial court erred when it ruled that Respondent's expectation of privacy under Article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution was violated when Detective Heyen viewed the thumb drives provided by Mr. Horton.
4. The trial court erred when it ruled that Mr. Horton did not have authority to grant consent to search the residence.
5. The trial court erred when it ruled that the search of the residence violated *State v. Ferrier*.
6. The trial court erred when it ruled that the evidence seized from Respondent's house violated Article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution.

II. Issues Pertaining to Assignment of Error.

1. Whether a search occurred within the meaning of article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution.
2. Whether Mr. Horton had legal authority to grant consent for law enforcement to search the thumb drives found in the residence.
3. Whether Respondent's expectation of privacy under Article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution was violated when Det. Heyen viewed the thumb drives provided by Mr. Horton.
4. Whether Mr. Horton had authority to grant consent for Det. Heyen to enter and search the residence.
5. Whether *Ferrier* warnings were required prior to Det. Heyen's entry to the residence.
6. Whether evidence seized from Respondent's house violated Article 1, section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution.
7. Whether Respondent had standing to challenge the warrantless search of the residence.

ARGUMENT

The court reviews a trial court's conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Smith*, 165 Wn.2d 511, 516 (2009).

Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *State v. Carter*, 151 Wn.2d 118, 125 (2004). An unlawful search occurs when the State has unreasonably intruded into a person's private affairs. *Id.* A “search” within the protection of the Fourth Amendment requires that the person seeking the protection of the Fourth Amendment have a justifiable, reasonable, or legitimate expectation of privacy in the thing examined. *Id.* at 127. In addition, the defendant must establish his subjective expectation of privacy. *Id.* “A subjective expectation of privacy is unlikely to be found where the person asserting the right does not solely control the area or thing being searched.” *Id.* See also *State v. Jeffries*, 105 Wn.2d 398 (1986). The burden is on the defendant to establish a subjective expectation of privacy. *State v. Jones*, 68 Wn.App. 843, 850 (Div.1, 1993), review denied, 122 Wn2d. 1018 (1993).

Whether an expectation of privacy gives rise to Fourth Amendment protection presents two questions: First, whether the individual, by his conduct, has exhibited an actual expectation of privacy,

that is whether he has shown that he sought to preserve something as private. Second, whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *State v. Rison*, 116 Wn.App. 955, 960 (Div. 3, 2003) citing *Bond v. United States*, 529 U.S. 334, 338 (2000).

If a search occurs, the State bears the burden of establishing the validity of a warrantless search. *State v. Mathe*, 102 Wn.2d 537, 541 (1984). Consent to a search establishes the validity of that search if the person giving consent has the authority to so consent. *Id.* A co-tenant or joint occupant with common authority over the premises or effects sought to be inspected may give valid consent to search of the premises or effect. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Mathe*, 102 Wn.2d at 543; *Jeffries*, 105 Wn.2d at 414.

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 will allow outsiders into shared areas. *State v. Morse*, 156 Wn.2d 1, 7 (2005). The third-party consent doctrine is based upon the theories of reasonable expectations of privacy and assumption of risk. *Id.* at 8. In the context of a search, consent is a form of waiver. *Id.* Ordinarily, only the person who possess a constitutional right may waive that right. *Id.* However,

common authority under article I, section 7 is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy. *Id.*

Under article I, section 7, whether a person can consent to the search of a premises is based upon that person's independent authority to so consent and the reasonable expectation of his co-occupant about that authority. *Id.* First, "the consenting party must be able to permit the search in his own right." *Id.* Second, "it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search." *Id.* "In essence, an individual sharing authority over an otherwise private enclave inherently has a lessened expectation that his affairs will remain only within his purview, as the other cohabitants may permit entry in their own right. *Id.* The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area. *Id.* at 11. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that the consenting co-occupant would invite others into the shared area. *Id.* A person may have free access to some areas of the premises but not all areas. *Id.* The existence and scope

of common authority is a legal question which must be determined by the court based upon the facts of each case. *Id.*

Consent of an individual who possesses common authority over the area being searched is valid even though another person with whom that authority is shared is absent from the premises and therefore unable to consent. *State v. Thompson*, 151 Wn.2d 793, 804 (2004) citing *Matlock*, 415 U.S. at 170; *Mathe*, 102 Wn.2d 537 (adopting the rule expressed in *Matlock*). A tenant may consent to searches of common areas of an apartment building and the tenant's own unit, even over the objection of the landlord. *City of Seattle v. McCready*, 124 Wn.2d 300, 307 (1994); *State v. Cranwell*, 77 Wn.App. 90, 103-104 (1995).

A. No search occurred of the thumb drives and Respondent assumed the risk that Mr. Horton would grant consent to search the drives.

As a threshold matter, no "search" occurred of the thumb drives because Respondent did not have either an objective or subjective expectation of privacy in the thumb drives. The trial court concluded that Respondent maintained an expectation of privacy in the thumb drives because they were not located with the computer equipment that Respondent had told Mr. Horton he could use. [CP 12:2] The trial court also concluded Respondent had an expectation of privacy because

Respondent was the owner of the thumb drives and they were located at his residence in the laundry room. [CP 13:7]

However, this conclusion is contradictory to the court's own findings that Mr. Horton was permitted to use all items that were not marked as off limits. [CP 7:3-4] The trial court ruled that Mr. Horton exercised common authority over the residence. [CP 12:1] He had access to all areas of the house that were not specifically designated off limits by post-it notes. [CP 7:3-4]. The flash drives were found in the laundry room which was a room that was not designated as off limits. [CP 7:6] The flash drives had no security passwords, encryption or any other privacy protections on them. [CP 7:7] Mr. Horton simply found the drives when he was searching for a lightbulb. [CP 7:7]

However, the trial court, concluded that Respondent still maintained an expectation of privacy in the thumb drives. By all factual accounts, Respondent did not have an expectation of privacy in the thumb drives because they were in a location readily available to Mr. Horton and were not designated as off limits.

The trial court focused on the fact that Det. Heyen viewed more data on the thumb drive than that viewed by Mr. Horton. [CP 8:11, 17] However, such a finding is irrelevant. If Respondent did not have an expectation of privacy in the thumb drives as a whole, it does not matter

how much, if any, of the drives Mr. Horton viewed before turning them over to law enforcement. The trial court also concluded that Respondent maintained an expectation of privacy because their location in the lightbulb box implied secrecy rather than mere misplacement. [CP 14:12] However, Respondent cannot now claim that once incriminating evidence is found by Mr. Horton, some expectation of privacy springs back into place on an item he may have forgotten was even there. Further, Respondent cannot argue that an expectation of privacy remained as against law enforcement even if there was no expectation of privacy against Mr. Horton. If Respondent intended on the thumb drives remaining off limits, the burden was on him to designate them as such. Respondent cannot grant free access to all undesignated items in the house, and then when incriminating evidence is found, come back and claim, “oh wait, I forgot that was there, I didn’t mean for you to have access to that” and thereby negate what has already occurred as a lawful discovery of the item.

Respondent had no objective expectation of privacy in the thumb drives because he had not specifically listed them as off limits and any resident of the house would believe that they had the right to use anything that was not designated as off limits, as was the agreement between Respondent and Mr. Horton. He also had no subjective expectation of

privacy. By specifically listing all items that were off limits and giving Mr. Horton free access to any items that were not listed as off limits, he waived an expectation of privacy on any items that he did not explicitly list as off limits. If there is no expectation of privacy, there is no search, whether the viewing is done by a private citizen or by law enforcement. *Carter*, 151 Wn.2d 118 at 127. Therefore, the trial court erred when it concluded that a “search” had occurred when law enforcement viewed the contents of the thumb drives turned over by Mr. Horton.

As a corollary to the fact that no search occurred, even if Respondent did have some expectation of privacy in the thumb drives, he assumed the risk that Mr. Horton would permit consent to search the devices when he allowed Mr. Horton full use of all items in the house except those specifically noted off limits, which the thumb drives were not. The search of the thumb drives was conducted pursuant to a lawful third party consent search.

The trial court’s findings of fact make clear that Mr. Horton was given full access to use any items in the house that were not designated as off limits. It is legally irrelevant that Respondent may have forgotten that he had hidden the thumb drives in the light bulb box. To be clear, there is nothing in the record to suggest that Respondent did not know the thumb drives were there. Respondent’s underlying motion to suppress is

on the factually unsupported argument that Respondent did not know the thumb drives were there and he did not intend on granting Mr. Horton permission to use them. However, there are no facts in the record to support such a claim. The record simply supports that Mr. Horton was given access to anything not listed off limits and the thumb drives were not listed as off limits. Any assertions by Respondent that he did not know the thumb drives were there or that he did not intend on Mr. Horton having access to them is not supported by the factual record and this Court should not consider facts that are not supported in the record.

The question is whether or not Mr. Horton had legal authority to use the thumb drives based on his agreement with Respondent. Respondent made clear that designated items were off limits, and all other items were free to be used by Mr. Horton. [CP 7:3-4; RP 18:14-25] Respondent made an explicit list of items and explicitly designated which items were off limits. [CP 7:3-4; RP 18:14-25] By doing so and giving Mr. Horton free access to anything not specifically listed, he implicitly gave Mr. Horton permission to use the flash drives. What Respondent seeks to do now is impose an *ex post facto* limitation on Mr. Horton's authority that was not in place when the thumb drives were located. It is only now, after incriminating evidence was found, that Respondent seeks

to assert a privacy right that he explicitly waived when he did not designate the thumb drives as off limits.

Since Mr. Horton had authority to access the laundry room and implicit authority to use the drives, he had authority to consent to a law enforcement search of the drives. The trial court therefore erred when it ruled that Mr. Horton did not have the authority to consent to the search of the thumb drives when he delivered them to law enforcement.

B. Mr. Horton gave valid consent to enter the house.

For the same reasons stated above, Mr. Horton had valid authority to consent to a search of the house. It is important to note that Detective Heyen did not search any areas that were designated as off limits by Respondent, only those areas that were common areas. [CP 9:15, 10:18]

The trial court focused on the fact that Detective Heyen did not seek permission from Respondent to view the residence or its premises. [CP 11:21, 13:6, 15:15] However, this consent is not needed. A co-tenant's consent is not required if someone present with authority validly grants consent and the defendant is not there to object. *Thompson*, 151 Wn.2d at 804 citing *Matlock*, 415 U.S. at 170; *Mathe*, 102 Wn.2d 537. There is no legal requirement for Det. Heyen to seek out consent of all individuals who may have authority over the common areas of the house

when he has been granted consent by the only present individual who does possess lawful authority to grant consent.

Furthermore, it is questionable whether Respondent even maintained any legal authority over the house. He was residing in Maine and had not been at the house for quite some time. [CP 7:2] While Respondent and Mr. Horton did not have a formalized agreement, he was for all intents and purposes a tenant of the property. A tenant may consent to searches of common areas of an apartment building and the tenant's own unit, even over the objection of the landlord. *McCready*, 124 Wn.2d at 307; *Cranwell*, 77 Wn.App. at 103-104.

Therefore, Mr. Horton had authority to grant Det. Heyen permission to enter and search areas searched in his own right.

C. Ferrier warnings were not required for Det. Heyen to enter the house.

The trial court appeared to focus some of its analysis on the fact that *Ferrier* warnings were not given to Mr. Horton prior to entry of the home. However, this was not an issue raised by Respondent at the trial court level during the motion to suppress. It is therefore improper for the trial court to make a ruling based on an issue not raised by Respondent.

Furthermore, Respondent has no legal basis to assert *Ferrier* as he was not present at the home and consent was not sought from him, but rather from Mr. Horton who has not asserted any violation of *Ferrier*.

While Appellant agrees that *Ferrier* warnings must be given prior to a “knock and talk” based consent search of a residence, a long line of cases have held that *Ferrier* is extremely limited and does not apply outside of a situation where law enforcement is performing a “knock and talk” for the purposes of gaining entry to search for evidence of a crime.

The ruling in *Ferrier* was limited to “officers conduct[ing] a knock and talk for the purpose of obtaining consent to search a home.” *State v. Ferrier*, 136 Wn.2d 103, 118 (1998). The *Ferrier* warnings must be given “prior to entering the home.” *Id.* at 119. See also *State v. Budd*, 185 Wn.2d 566, 573 (2016) (“*Ferrier* requires that police officers ‘must, prior to entering the home, inform the person...’”). This is because “constitutional protections of privacy are strongest in the home.” *State v. Ruem*, 179 Wn.2d 195, 200 (2013). The Fourth Amendment has drawn a firm line at the entrance to the house. *Id.* citing *Payton v. New York*, 445 U.S. 573, 590 (1980).

Ferrier has been extended to include consent searches of other residential buildings, however this expansion has been limited to entry into an actual building with the equivalent protections of a residence. See

State v. Kennedy, 107 Wn.App. 972 (Div.2 2001) (*Ferrier* warnings apply to consent search of defendant's motel room because an individual has the same expectation of privacy in a motel room as they would in a private residence).

However, *Ferrier*'s application has routinely been limited to only those consent searches associated with "knock and talk" procedures and have declined to extend the holding to other situations where officers seek consent to enter a residence. See *Ruem*, 179 Wn.2d at 206 (entry to serve an arrest warrant on a person who might not live at the home); *State v. Thang*, 145 Wn.2d 630 (2002) (entry to serve an arrest warrant on a guest); *State v. Williams*, 142 Wn.2d 17 (2000) (entry to serve an arrest warrant on a guest; opinion indicates that *Ferrier* warnings need not be given when officers enter a house to inspect an alleged break-in, vandalism, and "other routine responses"); *State v. Bustamante-Davila*, 138 Wn.2d 964 (1999) (entry to serve presumptively valid deportation order); *State v. Overholt*, 147 Wn. App. 92 (2008), review denied, 165 Wn.2d 1047 (2009) (suspect displayed evidence to officers, without the officers asking for consent to search); *State v. Dodson*, 110 Wn. App. 112, 124 (2002), review denied, 147 Wn.2d 1004 (2002) (to inquire into the whereabouts of a suspect and to request permission to search outbuildings for a stolen 3-wheel vehicle); *State v. Johnson*, 104 Wn. App. 409 (2001)

(consent from individual who is already in custody); *State v. Leupp*, 96 Wn. App. 324 (1999), review denied, 139 Wn.2d 1018 (2000) (sweep for injured persons when responding to a 911 hang-up call); *State v. Westvang*, 184 Wn. App. 1 (2014) (Ferrier warnings are not required when law enforcement officers seek consent to enter a home to execute an arrest warrant); *State v. Dancer*, 174 Wn. App. 666 (2013), review denied, 179 Wn.2d 1014 (2014) (the officer's failure to provide Ferrier warnings did not render consent invalid where the officers had independent corroborating evidence, a K-9 track, that the person could actually be found in the home); *Overholt*, 147 Wn. App. 92, review denied, 165 Wn.2d 1047 (2009) (*Ferrier* warnings are not required when the officer is in fresh pursuit of the suspect and the officer does not enter into the home or any other building on the property with the intent of seeking consent to search)

What this long line of cases reveals is that, while *Ferrier* is a bright-line rule with clear implications relating to “knock and talk” consent searches of homes, its holding is strictly limited to those situations and the courts have declined to extend that holding. Rather the courts continue to refine and limit the scope of *Ferrier* to entry of the home for the purpose of obtaining consent to search based exclusively on “knock and talk” situations.

Courts have also declined to extend *Ferrier* to non-residence searches, even of items or locations where a subject has a legitimate expectation of privacy. *Ferrier* does not require warning in every case where police obtain search authority by consent. *State v. Tagas*, 121 Wn.App. 872, 878 (Div.1 2004) citing *Williams*, 142 Wn.2d at 26. The Division Three court refused to extend *Ferrier* to automobiles, an area long recognized as having a legitimate privacy interest. *State v. Witherrite*, 184 Wn.App. 859 (Div.3 2014) review denied 182 Wn.2d 1026 (2015). See also *Tagas*, 121 Wn.App. at 878 (holding that officers need not inform *Ferrier* warnings prior to conducting a search of personal belongings such as bags or purses).

It is paramount to remember the Court's rationale for their ruling in *Ferrier*. It was to protect against deception by law enforcement. In *Ferrier*, the officers admitted that they conducted the knock and talk in order to avoid the necessity of obtaining a search warrant authorizing a search of the home. *Ferrier*, 136 Wn.2d at 115. The Court stated as follows

Central to our holding is our belief that any knock and talk is inherently coercive to some degree. While not every knock and talk effort may be accompanied by as great a show of force as was present here, we believe that the great majority of home dwellers confronted by police officer 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 115-116. The Division Three Court in *Overholt* refused to apply *Ferrier*, in part, because the officers' actions were in no way deceptive and therefore did not fall under the rationale of *Ferrier*. *Overholt*, 147 Wn.App. at 96. "There was no attempt to mislead Mr. Overholt about what was going on." *Id.*

In this case, while it does involve an eventual search of the interior of the house, Detective Heyen's purpose in going to the house was not initially to search the residence. His intent was to "interview Horton and obtain background information regarding the circumstances of Horton's occupancy of Hester's residence along with the discovery of the flash drives." [CP 9:13; RP 39:10-13] Mr. Horton was the one who actually invited Det. Heyen into the house. [RP 23:1-4] After interviewing Mr. Horton, Det. Heyen asked Mr. Horton if he could take pictures of the inside of the house, which Mr. Horton agreed. [CP 9:15] Mr. Horton never objected or showed any reservation about Detective Heyen taking photos of the house. [CP 9:16] In fact, Mr. Horton had been the one to contact law enforcement about the alleged criminal activity to begin with. [CP 8:10]

This situation is a far cry from *Ferrier*. Detective Heyen was not conducting a “knock-and-talk.” He was following up on an investigation initiated by Mr. Horton himself and he was invited into the house by Mr. Horton for the express purpose of continuing the investigation. There is nothing deceptive about Detective Heyen’s actions that would warrant the application of *Ferrier* warnings.

The facts of this case fall more under the long line of cases, *supra*, that have held *Ferrier* warnings are not actually required. Furthermore, Respondent has no legal standing to assert a *Ferrier* violation against Mr. Horton, when he himself was across the country in Maine at the time of the investigation and had no apparent authority to consent to or deny a search of the house in his own right.

Even if the Court were to consider this situation a “knock and talk,” this situation does not fall within the rationale of *Ferrier*. *Ferrier* should not apply to a non-suspect occupant of a home who initiates contact with law enforcement to report evidence of a crime found in their home.

Therefore, it was improper for the trial court to rule that *Ferrier* supported suppression of evidence in this case.

D. Respondent lacks standing to challenge the search of the residence.

Appellant also lacks standing to challenge the legality of the search of the house. In *Williams*, a citizen contacted law enforcement to advise that the defendant, who had a warrant for his arrest, was at a particular residence. 142 Wn.2d at 19. Two officers, after confirming the defendant's van was at the residence, approached the apartment's open door and called inside for the defendant. *Id.* at 20. The tenant, a different individual, appeared in the doorway. *Id.* The tenant allowed the officers inside to look for the defendant. *Id.* When they entered, they immediately saw the defendant and arrested him. *Id.* In a search incident to arrest, heroin was found on the defendant and he was subsequently charged with possession of a controlled substance. *Id.* The defendant was not living at the apartment and had just come over to help move some of the tenant's belongings with his van. *Id.*

Automatic standing to challenge a search was rejected by the US Supreme Court in *United States v. Salvucci*, 448 U.S. 83 (1980). *Id.* at 21. The US Supreme Court held that a defendant charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. *Id.* at 22 citing *Salvucci*, 448 U.S. at 85. However, automatic standing still remains valid in Washington State. *Id.* Yet, automatic standing is only proper where (1)

the defendant is legitimately on the premises where a search occurred and (2) the fruits of the search are proposed to be used against him. *Id.*

A challenge to a search requires that the accused have a legitimate expectation of privacy in the place searched or the item seized. *State v. Boot*, 81 Wn.App. 546, 550 (Div.3, 1996). That legitimate expectation of privacy exists if the individual has manifested an actual, subjective expectation of privacy in the area searched and society recognizes the individual's expectation of privacy as reasonable. *Id.* The burden is on the defendant to establish the expectation of privacy. *Id.*

In *Williams*, the court refused to grant the defendant standing to challenge the entrance to the tenant's apartment. *Williams*, 142 Wn.2d at 23. The automatic standing rule may not be used where the defendant is not faced with the risk that statements made at the suppression hearing will later be used to incriminate him. *Id.* Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime. *Id.* The Division Three Court also refused to grant standing to the defendant in *Boot*, where the defendant was merely a temporary guest. *Boot*, 81 Wn.App. at 551. See also *Jones*, 68 Wn.App. 843.

In *State v. Goucher*, 124 Wn.2d 778 (1994) officers conducted a warrant search of a suspect's residence. *Id.* at 780. During the search, the

phone rang and was answered by one of the officers. *Id.* The caller, the defendant, believing the officer was a narcotics dealer, asked if he could come over and buy some narcotics. *Id.* at 781. The officers then conducted a controlled buy when the defendant showed up. *Id.* The defendant challenged the officers' search of the house by means of answering the telephone and by extension the search warrant itself. *Id.* The Court concluded under general rules of standing, that the defendant had no standing to challenge the search warrant of the house because he had no legitimate expectation of privacy in the house. *Id.* at 789.

In this case, Respondent has no standing to challenge the search of the house. He was not present at the house and for all intents and purposes had no authority over the property at that time given his arrangements with Mr. Horton. Arguably, Respondent could have standing to challenge the search of any areas designated as off limits, such as his bedroom; however, none of those areas were searched and the only areas searched by Det. Heyen were the common areas or areas that Mr. Horton had free access to. Therefore, Respondent has no legal standing to challenge the search of the residence in this case.

E. The trial court did not issue rulings on the remaining asserted issues raised by Respondent in his motion to suppress.

Respondent's motion to suppress asserted multiple other issues including: whether there was probable cause for issuance of the search warrant; whether the search warrants listed items to be seized with sufficient particularity; whether Det. Sloan's warrant was timely executed; and whether Det. Heyen's search warrant satisfied *Aguilar-Spinelli*. The trial court, having found the warrantless searches of the thumb drives and the house to be in violation of Respondent's expectation of privacy, did not rule on these remaining issues.

If this court were to reverse the trial court's ruling, Appellant believes this case would require remand to the trial court to issue rulings on the remaining issues asserted in Respondent's motion to suppress.

CONCLUSION

Respondent had no legitimate expectation of privacy in the areas of the house that were not explicitly designated as off limits, which included both the laundry room and the found thumb drives. Therefore, no search occurred when Det. Heyen viewed the contents. Furthermore, Respondent assumed the risk that Mr. Horton would grant third party consent to any areas and items that were not designated as off limits. When Mr. Horton delivered the thumb drives to law enforcement and permitted Det. Heyen

to enter and search the house, he gave valid, lawful consent to search. Respondent's expectation of privacy under both article 1, section 7 of the Washington State Constitution and Fourth Amendment to the US Constitution were not violated. Appellant asks this Court to reverse the trial court's ruling granting suppression and remand this case to the trial court for further proceedings in accordance with this ruling.

Dated this 22nd day of March, 2017

Respectfully Submitted:



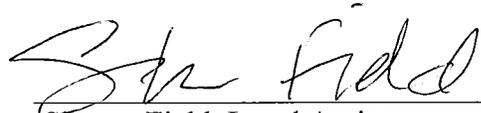
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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 23rd day of March, 2017, I provided email service to the following, a true and correct copy of the Opening Brief of Appellant:

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