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NO. 347877
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON,
Appellant

v.

DANIEL ADRON HESTER
Respondent

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

NO. 14-1-00252-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The Trial Court ruled correctly in finding that Detective Heyen's warrantless search of Respondent's data storage drives and warrantless search of Respondent's residence violated a reasonable expectation of privacy protected by the Fourth Amendment and Art. I Sec. 7.

- A. Warrantless Search of the "thumb drives".
- B. Warrantless Search of the Residence.

2. Appellant never raised Respondent's "standing" before the Trial Court. The argument should not be considered on appeal.

II. STATEMENT OF THE CASE

A. FACTS

Daniel Hester, (Respondent), owned a home near Okanogan. CP 7. Respondent arranged through a local business owner, Dennis Carlton, for a trustworthy caretaker during Respondent's expected six month absence from his Okanogan home. RP 9-10. Carlton believed one of his employees, Cary Horton, to be appropriate for the task of looking after the house, like a caretaker. RP 12-13. Horton had worked for Carlton about one year. RP 12. Respondent and Horton agreed for Horton to stay at Respondent's Okanogan home, rent free, to watch the house while Respondent was back East tending to family matters. RP 15-16. Horton only paid for internet service at the house, \$40 dollars per month, while acting as caretaker. RP

16. Horton stayed at Respondent's house alone and watched the house during the winter 2013-2014. RP 16. Horton and Respondent never co-habitated at the residence. RP 15-17.

Instructions for the caretaker included a list of places and items within the home deemed "off limits" or "private". RP 17. CP 7. "Sticky" notes were also utilized throughout the home by Respondent to warn Horton "Don't touch". CP 7. In response to questioning, Horton testified there were "post-its" on almost everything. RP 18. Respondent's bedroom and some electronic equipment and computers were specifically marked as "off-limits", "don't touch". CP 7. One computer and peripheral equipment located in the kitchen were expressly authorized by Respondent for Horton's use; operating instructions were also attached to the kitchen computer only via sticky note. RP 18; CP 7. Respondent had about a dozen computers or hard drives located in the home. CP 57. Of all the computer-type equipment in the house, only the kitchen computer was specifically designated for Horton's use. CP 7-8.

In April 2013, while Horton was acting as caretaker, a light bulb burned out and he intended to take steps to replace the bulb. CP 7. RP 20. Horton looked in the basement for a light bulb. RP 20. He opened a box marked "light bulbs" and two computer data storage devices ("thumb

drives”) fell out. RP 20. CP 7. The items were one PNY 256 MB “Thumb Drive” and one SAN DISK 64 MB “Memory Stick Pro”. CP 7. Respondent never expressly authorized Horton to examine or access data devices or computer files, except for the kitchen computer and its internal files. RP 18, 27. The “Thumb Drive” and “Memory Stick Pro” were in no way associated with the kitchen computer Horton was specifically authorized by Respondent to use. CP 8. Besides the kitchen computer, other computer equipment in the house was deemed “off limits”. CP 7-8. In testimony, Horton acknowledged that the two thumb drives found in the basement served him no legitimate purpose whatsoever in his role as caretaker. RP 28. Horton acknowledged in his testimony that such devices are used exclusively to store a person’s private documents, digital media, records and the like. RP 28. Horton never sought permission from Respondent to use or examine the two data storage devices (thumb drives). CP 8. Because he found it “strange”, Horton immediately put one of the thumb drives in his personal laptop computer. CP 8. Horton testified that images of “naked boys” popped up and he immediately quit viewing and shut down his computer. RP 21. CP 8. Horton consulted his employer, Dennis Carlton. RP 21. CP 8. Carlton did not view any files on either of the two “thumb drives”. CP 8. Carlton and Horton took the two thumb drives to the Okanogan County Sheriff, Frank Rogers. RP 21-22. Sheriff Rogers did not

look at the data on the thumb drives, but referred the matter to Deputy Rob Heyen. CP 8. Heyen was advised there may be pictures of naked boys on the thumb drives. CP 8. At no time did Horton, Carlton, Rogers or Heyen discuss the ages of the persons whose pictures were on the thumb drives. CP 8. Heyen was advised the devices did not belong to Horton or Carlton; Heyen knew that the thumb drives were recently removed from a private storage location located inside Respondent's house. CP 8; RP 36-37; RP 44-45. Detective Heyen never asked Horton for his permission to search the thumb drives' content and Horton never offered his consent. RP 45. At 3.6 Hearing, the Appellant offered no evidence whatsoever that any person had given permission to search the thumb drives. RP 34-52. Without a search warrant, Heyen seized and copied all digital media content from the two thumb drives onto his office computer. CP 8. Without a warrant, he viewed the entire content of both data devices. CP 8. He viewed all images on the drives and, on first viewing, there did not appear to be any images of sexual activity. CP 9. He later identified two images involving a person Heyen believed to be under the age of 18 touching his own penis. CP 9. He believed there was evidence of "sexually explicit conduct" for purposes of sexual stimulation under RCW 9.68A.011(4)(f)and(g). CP 9. Heyen went to Respondent's home the next day to talk to Horton. CP 9. Without a warrant and without obtaining written consent from Horton, Heyen entered

Respondent's home and took pictures. CP 9. Although consent was never sought, Horton did not object to Heyen walking around Respondent's house. CP 9. Heyen considered Horton's consent to be implied. CP 10. Heyen never sought permission from homeowner, Dan Hester. CP 11. In the warrantless residence search, Heyen noticed numerous computers and various items of computer equipment, Respondent's family photos, an internet connection. CP 10.

Without getting a search warrant, and without permission from Horton or Respondent, Heyen copied twelve photos (taken from the thumb drives) onto a CD; he delivered the photos to the National Center for Missing and Exploited Children, (NCMEC). CP 11. On April 29, 2013, for the first time since his April 9 meeting with Horton, Deputy Heyen applied for and received a search warrant. CP 11. Heyen used facts from his warrantless viewing of the thumb drives to get a warrant to search Respondent's home; he failed to disclose to the issuing magistrate that he viewed the thumb drives without a search warrant, and without the consent of Respondent or Horton. CP 11. On June 12, 2013, Detective Craig Sloan applied for and received a search warrant to search the content of multiple computers and hard drives seized from Respondent's home. CP 11.

Detective Sloan mentioned in his search warrant application that the Department of Homeland Security was now refusing to examine the computers, after initially saying they would. CP 60. Two Homeland Security Agents had participated in searching Respondent's residence. CP 40. Detective Sloan's affidavit for search warrant to search for data failed to list or mention in any way the two thumb drives previously searched without a warrant by Detective Heyen. CP 57-61.

B. PROCEDURE

Respondent was charged by information with one count Possessing Depictions of Minors, First Degree, on count Possessing Depictions of Minors, Second Degree. CP 103-104. The Okanogan County Superior Court conducted a CrR 3.6 hearing on September 24, 2015. RP 3-73. As a result of the hearing and Defendant's Motion to Suppress, the Court issued Findings of Fact & Conclusions of Law; the Trial Court suppressed all evidence based on violations of Respondent's rights under the Fourth Amendment and Art. I Sec. 7. CP 6-16. CP 1.

III. ARGUMENT

1. THE TRIAL COURT RULED CORRECTLY IN FINDING DETECTIVE HEYEN'S WARRANTLESS SEARCH OF RESPONDENT'S DATA STORAGE DEVICES AND WARRANTLESS SEARCH OF RESPONDENT'S RESIDENCE VIOLATED A

REASONABLE EXPECTATION OF PRIVACY PROTECTED BY THE
FOURTH AMENDMENT AND ART. I SEC. 7.

A. WARRANTLESS SEARCH OF THE “THUMB DRIVES”

1. In granting Respondent’s motion to suppress, the trial court made extensive Findings of Fact which support Respondent’s reasonable expectation of privacy. CP 7-11. These unchallenged Findings of Fact are verities on appeal. State v. Hill, 123 Wn. 2d 641, 644, 870 P. 2d 313 (1994). Appellant suggests Respondent assumed the risk that his privacy would be lost. In fact, Respondent demonstrated that he expected privacy in his home by seeking out a trustworthy caretaker to “watch the house during Respondent’s absence”. CP 7. The caretaker lived at the house rent free, only paying \$40 internet per month. RP 16. CP 7. Respondent’s home contained numerous computer-related items, hard drives, and the like. CP 10. CP 57-58. Of all the computer-related equipment located in the home, only one computer and peripheral equipment was specifically designated available to caretaker Horton. CP 7. Many post-it notes and a list located in the house expressed Respondent’s expectation of privacy. CP 7. The court only found that Horton could access “most everything” in the house. CP 7. The two thumb drives, however, could not possibly have been contemplated in the caretaking arrangement since they were out of sight, stored in a remote basement location and were totally unrelated to Horton’s

caretaking duties. CP 7-8. Horton admitted in testimony that he had no legitimate purpose, as caretaker, in accessing the thumb drives. RP 18. Computer data storage devices, the two thumb drives were in no way associated with the one computer Horton was allowed to use. CP 8. The Trial Court apparently drew reasonable conclusions from this fact: a dozen or so computers and/or drives were in the house and only one expressly designated for Horton's use. CP 7-8. CP 57-58. Horton only explored the thumb drives because he thought they were "strange". CP 8. Respondent could reasonably expect that his hired caretaker would not intrude into his private documents and digital files. It seems objectively reasonable that a hired caretaker would stay out of a homeowner's private items that served the caretaker no legitimate purpose. Horton admitted in testimony that he knew thumb drives are used exclusively for storage of digital documents, media, records and the like. RP 28. They served his role as caretaker in no way. Horton may have deduced that he was free to get into anything he wanted, but the Trial Court was free to find Horton's interpretation unreasonable.

"The ultimate touchstone of the Fourth Amendment is Reasonableness". Riley v. California, 573 U.S. ____ (2014), quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006). The data contents of a cell phone seized incident to arrest may not be searched without a warrant.

Riley, 573 U.S. ____ (2014). It follows that Respondent's expectation of privacy in the data on his thumb drives was reasonable under the Fourth Amendment. For the purposes of the Fourth Amendment, Detective Heyen conducted a warrantless search and no exception to the warrant requirement exists.

The Federal Constitution, however, only establishes the minimal level of protection for individual rights. State v. Chrisman, 100 Wn. 2d 814, 817, 676 P. 2d 963 (1984). "It is now axiomatic that Article I, Section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 Wn. 2d 486, 493, 987 P. 2d 73 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. State v. Ladsen, 138 Wn. 2d 343, 979 P. 2d 833 (1999); State v. Ferrier, 136 Wn. 2d 103, 111, 960 P. 2d 927 (1998). Indeed, the scope of the protections offered by Article I Sec. 7 is "not limited to subjective expectations of privacy but, more broadly, protects those privacy interest which citizens of this state have held, and should be entitled to hold, safe from governmental trespass without a warrant. Parker, 139 Wa. 2d at 494. Although they protect similar interests, "the protections guaranteed by Article I, Sec. 7 of the State Constitution are qualitatively different from those provided by the Fourth Amendment . . ." State v. McKinney, 148 Wn.

2d 20, 26, 60 P. 3d 46 (2002). While Fourth Amendment analysis hinges on the reasonableness of the search, “. . .Article I, Sec. 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not.” State v. Eisfeldt, 163 Wn. 2d 628, 185 P. 3d 580 (2008). In Eisfeldt, the Washington State Supreme Court adopted a “bright line holding” making the “private search doctrine” inapplicable under Article I Sec. 7. Id. at 638. The Defendant’s privacy interest in the two data storage devices remains fully intact under Article I Sec. 7 in spite of the delivery of the devices to police by a third party. Id. The Eisfeldt court cites State v. Boland, 115 Wn. 2d 571, 800 P. 2d 1112 (1990):

We have repeatedly held the privacy protected by Article I Sec. 7 survived where the reasonable expectation of privacy was destroyed under the Fourth Amendment. For example, in State v. Boland, this Court found a warrantless search of an individuals garbage violated Article I Sec. 7 . . .by contrast, the United States Supreme Court previously held individuals had no reasonable expectation of privacy in their garbage.

Eisfeldt, 163 Wn. 2d at 638.

The Appellant argued to the Trial Court that if Respondent did have an expectation of privacy, the consent of Horton eliminates the warrant requirement. RP 56. This case involves a warrantless search of computer data storage devices by Detective Heyen. Warrantless searches and seizures are “per se” unreasonable under both the State and Federal Constitutions.

State v. Walker, 136 Wn. 2d 678, 682, 965 P. 2d 1079 (1998). The Washington Supreme Court has warned that “where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.” State v. Leach, 113 Wn. 2d 735, 744, 782 P. 2d 1035 (1989). A warrantless search is presumed unlawful unless the State proves it falls within one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn. 2d 733, 736, 689 P. 2d 1065 (1984). This rule is strict one. State v. Parker, 139 Wn. 2d 486, 493, 987 P. 2d (1999). The government bears a heavy burden of establishing exceptions to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn. 2d 242, 250, 207 P. 3d 1266 (2009).

The uncontested findings of fact fail to support any exception to the warrant requirement. The consent exception cannot apply to the facts of this case because Horton never gave consent to search the thumb drives and Detective Heyen never asked for it. RP 44-46. Just being in possession of these data storage devices did not, in and of itself, bestow on Detective Heyen authority to search the drives’ content. Riley v. California, 573 U.S. __ (2014). Applied to the present case, Riley emphasizes that police need a warrant to search devices that store digital data. Id. Part of the reasoning included the vast capacity for data storage and resulting implication of privacy interest.

16 GB translates to millions of pages of text, thousands of pictures, hundreds of videos. *Id.* Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” *Boyd, supra*, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a warrant.

Riley v. California, 573 U.S. ____ (2014).

“Get a warrant” is exactly what Detective Heyen should have attempted. Whether Horton had capacity to consent should not be an issue here since the record reflects no evidence of consent whatsoever. The Appellant points to no other exception to the warrant requirement. Accordingly, the Trial Court correctly found this case to involve a warrantless illegal search of Respondent’s constitutionally protected private property. The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Acrey, 148 Wash. 2d 738, 746, 64 P. 3d 594 (2003). The Appellant has failed in this regard.

There is not “good faith” exception to the warrant requirement under Art. I, Sec. 7. State v. White, 97 Wash. 2d 92, 110, 640 P. 2d 1061 (1982). The Trial Court relied on substantial evidence in concluding that Detective Heyen “searched” the two thumb drives when he copied them onto his own computer and viewed each and every file. CP 8-9. Later, Detective Heyen

used the fruits of his illegal searches to obtain a warrant; all evidence obtained from the search warrant was properly suppressed pursuant to the exclusionary rule as “fruits of the poisonous tree”. State v. Duncan, 146 Wn. 2d 166, 176, 43 P. 3d 513 (2002).

B. THE WARRANTLESS SEARCH OF THE RESIDENCE

Concerning the warrantless search of Respondent’s home, Appellant suggests that a “consent” exception applies. The Trial Court reasonably found, however, that consent required compliance with State v. Ferrier, Wn. 2d 103, 111, 960 P. 2d 927 (1998). CP 15. Ferrier was cited in Respondent’s trial brief and the Judge was entitled to apply the case as he saw fit. CP 80. The evidence supports the Court’s findings that Detective Heyen engaged in a “knock and talk”; Detective Heyen went to interview Horton and ended up searching the house without a warrant and without complying with Ferrier. Deputy Heyen could not recall asking permission from Horton to walk around the premises. CP 9. Appellant’s claim of consent fails. Once again, Detective Heyen had ample time to apply for a warrant but chose not to. Appellant cannot show any exception to the warrant requirement by clear and convincing evidence.

The heightened protection afforded State citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside a warrant requirement.

State v. Chrisman, 100 Wn. 2d 814, 822, 676 P. 2d 963 (1984). As with any warrantless search, a warrantless search of a home is presumptively unreasonable. State v. Cotten, 75 Wn. App 669, 678, 879 P. 2d 971 (1994), review denied, 126 Wn. 2d 1004 (1995).

Consent is one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Walker, 136 Wn. 2d 678, 682, 965 P. 2d 1079 (1998); State v. Hendrickson, 129 Wn. 2d 61, 69, 917 P. 2d 563 (1996). Before a warrantless search may be deemed consensual, the Court must find that the consent was voluntarily given and clear and convincing evidence is required. State v. Ferrier, 136, Wn. 2d 103, 111, 979 P. 2d 927 (1998).

2. APPELLANT NEVER RAISED RESPONDENT'S "STANDING" BEFORE THE TRIAL COURT. THE ARGUMENT SHOULD NOT BE CONSIDERED ON APPEAL.

Appellant suggests for the first time on appeal that Respondent lacked standing to challenge the warrantless search of his own home. This argument was never made to the Trial Court and, therefore, the argument is waived. State v. Cardenas, 146 Wn. 2d 400, 47 P. 3d 127 (2002).

As a proponent of the motion to suppress, Cardenas had the burden of establishing that his own Fourth Amendment rights were violated by the challenged search. . . This burden arises only if the defendant's standing to claim a privacy violation has been challenged. If the issue of standing is not raised to the trial court, it may not be considered on appeal.

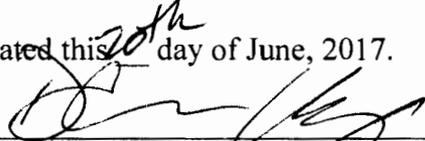
Cardenas, 146 Wn. 2d at 404-405.

For sake of argument, even if Appellant had preserved the issue for appeal, Appellant's argument must fail. Respondent owned the home and its contents. CP 7. He'd arranged a caretaker to protect Respondent's interests at the residence. CP 7. Respondent was charged with possession of items seized from his own residence and standing seems apparent. State v. Boot, 81 Wn. App. 546, 915 P. 2d 592 (Div III 1996). This Court should decline Appellant's request to consider the issue of standing

IV. CONCLUSION

The Trial Court's reasoning is well-supported by the record. The Appellant cannot demonstrate any exception to the warrant requirement. The Trial Court correctly found two unlawful, warrantless searches requiring suppression of evidence. The Trial Court's ruling should be affirmed.

Dated this ^{20th} day of June, 2017.



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IN THE COURT OF APPEALS
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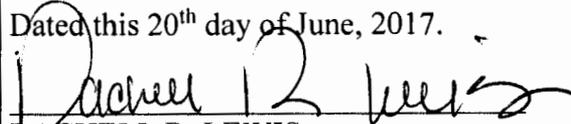
STATE OF WASHINGTON)
Appellant) NO. 347877
Vs)
DANIEL ADRON HESTER) DECLARATION OF MAILING
Respondent)
_____)

I, Rachell Lewis, declare under penalty of perjury of the laws of the State of Washington that I am over the age of 18, not a party to the above-entitled action. That on the 20th day of June, 2017, I deposited in the mail of the United States Postal Service an addressed envelope with postage prepaid, with the original to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201 and a copy of the Brief of Respondent and the Declaration of mailing in the above-referenced matter to:

Mr. Branden Platter
Chief Criminal Deputy
P.O. Box 1130
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Mr. Daniel Hester
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Dated this 20th day of June, 2017.


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