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Division III
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34844-0-III

STATE OF WASHINGTON, Respondent,

v.

CAESAR ARROYO, Appellant.

APPELLANT'S REPLY

Jeff Burkhart, WSBA #39454
Two Arrows, PLLC
PO Box 1241
Walla Walla, WA 99362
Phone: (509) 876-2106
Jeff@2arrows.net
Attorney for Appellant

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I. ARGUMENT

I. The trial court's failure to enter written findings on Arroyo's suppression motion was not harmless error.

The State concedes that no written findings were entered on the suppression motion in this case, and that that failure was an error, and that the proceedings in this case are essentially identical to those in *State v. Smith*, 68 Wn. App. 201, 842 P.2d 494, 498 (1992). For the reasons stated in Appellant's Brief, the correct remedy in this case is the same as that in *Smith*: dismissal.

II. The trial court's ruling on Arroyo's suppression motion was wrongly decided.

In *Florida v. Jardines*, the Supreme Court of the United States held that the government's use of a trained police dog to investigate a front porch of a home and its immediate surroundings is a "search" within the meaning of the Fourth Amendment. 569 U.S. 1, 133 S. Ct. 1409, 185 L.Ed.2d 495 (2013). Police officers, like private citizens, may engage in the everyday activity of approaching a home by a front path and knock on the front door. *Id* at 8. The *Jardines* Court held that there is no "customary invitation" by a homeowner to having a dog sniffing around the area. *Id* at 9. Moreover, the customary invitation to enter the curtilage

is for routine visitations and social encounters from neighbors, solicitors, service providers, and the like, for routine purposes, not for conducting a search of the area. “The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.” *Id.* It is normal and expected for citizens and officers to approach a home at the front door, but no homeowner would think that a person who is walking around in the backyard is in a nonintrusive vantage point. An officer’s entry into the backyard of a home is an intrusion, and when the purpose of his entry is to investigate, the officer’s entry is a search. *Id.* at 11.

In this case, Trooper Bruchman’s entry into the backyard of the home exceeded the permitted area of an implied invitation to approach a house, and the entry was done for the purpose of searching the curtilage. Trooper Bruchman testified that he went to the “back corner of the house that I considered the backyard because it was farthest away from the street.” I RP 10. In other words, he intruded further into the curtilage of the home without a warrant, without exigent circumstances, and without the homeowner’s consent. From that point, he observed a black car parked behind a tree. I RP 10. After Trooper Bruchman had walked behind the house and saw the black car, he then began searching the backyard, and after walking east, he saw the camper trailer. I RP 14. Trooper Bruchman walked into the backyard, so his position was not akin

to a passerby on a public thoroughfare. *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L.Ed.2d 210 (1986). In contrast to the officer in *Payne*, Trooper Bruchman did not merely look over a fence from an impliedly open point of the curtilage; instead, he walked behind the house and searched the backyard. *State v. Payne*, 189 Wn. App. 1014, 366 P.3d 1244 (2015), *review denied*, 185 Wn.2d 1008 (2016). Nor was his position akin to a salesman or cable guy knocking on the front door; this is clear because Trooper Delano testified that he could not see the camper trailer from his position at the front door. I RP 26. He had to walk into the backyard first, and only after that intrusion could he observe the black car. I RP 24. After “checking the area,” the camper trailer was found. I RP 24. That the officers learned what they learned only by physically intruding on the property to gather evidence is enough to establish that a search occurred. *Jardines*, 569 U.S. at 11.

The right of a person to be free, in his home, from unreasonable government intrusion is at the core of the Fourth Amendment and article I, section 7 of the Washington Constitution. *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L.Ed.2d 734 (1961); *State v. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016). But the trial court below did not address the warrant requirement; indeed, the word “warrant” is not contained in the trial court’s analysis at all. The trial court’s oral ruling

cited police procedures as a rationale for Trooper Bruchman's search of the backyard, saying, "I think it's normal police investigation to have the cover officer to ensure that no one leaves out the back door." Supp. RP 7. There is no "police procedure" exception to the warrant requirement.

After noting that the conversation with the homeowner at the front door did not yield the answer the officers were looking for, the trial court found that their "continuing duty to investigate remains." Supp. RP 8. The trial court's ruling did not mention that the officers needed to get a warrant before searching the curtilage, or that there was an opportunity to do so. The Washington Supreme Court has warned that "[w]here 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) (quoting *United States v. Impink*, 728 F. 2d 1228, 1231 (9th Cir. 1984)). Like the canine officer in *Jardines*, Trooper Bruchman's behavior (walking into the backyard without permission) revealed "a purpose to conduct a search, which is not what anyone would think he had license to do." *Jardines*, 569 U.S. at 10.

The State relies on *Seagull* to argue that a warrant was not required for Trooper Bruchman's search, because he was lawfully present. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). The *Seagull* opinion,

written thirty-five years ago, was based on the *Katz* standard of reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The *Jardines* court reasoned that a *Katz* analysis of privacy expectation is not necessary for property-rights cases; rather, the *Jardines* court held that when a physical intrusion into the curtilage is what yields the evidence, the intrusion is a search. *Jardines*, 569 U.S. at 11. Moreover, under article I, section 7 of the Washington Constitution, our courts do not evaluate whether a defendant has a reasonable expectation of privacy in the area searched, but only whether the State has intruded into the defendant's private affairs. *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

While it is true that the *Jardines* opinion did not establish a bright line rule that officers may never enter the curtilage without a warrant, *Jardines* does stand for the proposition that an officer's license to enter the curtilage is limited by its purpose. *Jardines*, 569 U.S. at 9. Moreover, under Washington's article I, section 7, entry into private areas of the homestead are entitled to the strongest constitutional protections. *Budd*, 185 Wn.2d at 572. The burden is on the State to prove an exception to the warrant requirement. *Id.* at 572-73. Here, Trooper Bruchman was not following a normal route into or around the curtilage when he walked into an area of the backyard "furthest away from the street"; he wasn't on a

route to anywhere at all, other than to a place he wanted to search. I RP 10. The federal constitution and the Washington Constitution presume warrantless searches to be unreasonable. U.S. Const. Amend. IV; Wash Const. art. I, § 7. When, as here, an officer's purpose for walking into the backyard is to search the backyard, the officer's entry exceeds the customary invitation to approach a house, thus the entry constitutes a search and is unreasonable without a warrant. The trial court improperly denied Mr. Arroyo's CrR 3.6 motion to suppress evidence obtained from the unlawful search.

II. CONCLUSION

For the foregoing reasons, Arroyo respectfully requests that the court REVERSE his convictions and DISMISS the charges.

RESPECTFULLY SUBMITTED this 27 day of December, 2017.



JEFF BURKHART, WSBA #39454
Attorney for Appellant



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Caesar Arroyo, DOC # 395957
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mailing a copy to:

Leif Drangsholt
ldrangs@co.okanogan.wa.us

Shauna Field
sfield@co.okanogan.wa.us

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

Signed this 27 day of December, 2017 in Walla Walla,
Washington.



Andrea Burkhardt

BURKHART & BURKHART, PLLC

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Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
PO BOX 1241
WALLA WALLA, WA, 99362-0023
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