

FILED
Court of Appeals
Division III
State of Washington
2/6/2020 3:26 PM

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

No. 367886

STATE OF WASHINGTON, Respondent

v.

EDWIN ESPEJO, Appellant

APPELLANTS' OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The court erred when it failed to grant the defendant's motion to dismiss Counts 1, 2, and 3 of the information because the evidence of premeditation presented by the prosecutor was insufficient to support the charges.

2. The court erred when it failed to grant defendant's motion to suppress the evidence because the defendant's house was searched, and his body was seized by the police without a warrant as required by the United States and Washington States constitutions.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Does a conviction of first-degree murder require a prosecutor to provide evidence of premeditation sufficient enough to show a rational jury that the accused had time to deliberate before taking any action?

- 2 Do the constitutions of the United States and/or the State of Washington allow for the search of a person house and/or the seizure of a person without a warrant to investigate a crime?

STATEMENT OF THE CASE

Edwin Espejo and his wife Maria fell in love in high school; by the time Edwin was thirty the couple had six children. Edwin provided for his family by working sixty hours a week at the Tyson Meat processing plant. Trial Transcript P. 843 The couple had scraped by for years and managed to get enough money saved to put payment down on a new house. In the summer of 2017 and the family short on funds moved into a small basement to save while their new house was being completed. Trial Transcript P.844 In the basement they ate, slept, watched television and waited for the day soon to come when they would be having a home, a home of their own.

Work wore Edwin down and the children wore Maria out. The wait in the small confines of the basement frayed everyone's nerves; money was scarce and there was little left over for entertainment after the bills were paid.

On September 16, 2017 the Espejo's went to a party their cousins were having where the guests would be able to watch a championship fight. It was late when the family returned to the basement. Edwin was tired. Maria turned on the television. "Turn it off" Edwin said.

Edwin wanted to sleep, and the kids wanted to watch the television. Edwin pulled out the plug to the television. Maria told her oldest daughter to call the police. Maria told Edwin she was leaving and going to her mother's house. There was an argument about Edwin's drinking. Maria left the basement. By the time she reached the front yard, the first police officer, Matthew Griffin had arrived on the scene. Trial Transcript 849. Officer Griffin heard that a man was

hitting a woman. He called for help. He went into the house to investigate, he never talked to a victim of domestic violence. Trial Transcript P. 693 Lines 22-25. Almost immediately, he was joined by Pasco Police Officers Glass and Ramos. The three entered the basement with guns drawn. Within a minute a volunteer ride along and Officer D'Aquila entered the small basement. Sargent Allan, the officer in charge for the shift, entered the living room above the basement and heard fourteen to fifteen-gun shots which had come from the basement. Trial Transcript P. 560, Trial Transcript P 566-567. By the time Sargent Allan got downstairs, Mr. Espejo had been shot six times. The Sargent asked who had done the shooting. To his surprise, a reserve officer identified himself as one of the shooters. Sargent Allan described reserve officers as follows:

“So reserve officers, that’s a volunteer position. You get a limited amount of police training. Then you are supervised by a regular officer when you come out to volunteer your time on ride-alongs. They normally work like parade events, or high school games.” Trial Transcript P. 568, Lines 22-25, P. 569 Lines 1-2.

Detective Allan went on to explain that no volunteer in the last 35 years had been involved in a shooting. David Dillsworth was the first and only Pasco volunteer police officer to shoot another human being. Trial Transcript P. 592. Mr. Dillsworth was also the first person with the Pasco police to fire a lethal weapon at Mr. Espejo. He fired not once, not twice but fourteen times at Mr. Espejo with a gun he had brought from home. Mr. Espejo was indicted on three different counts of attempted first-degree murder, a felon in possession of a firearm and two charges of domestic violence.

Police entered Mr. Espejo’s house and detained him without a warrant. Prior to trial, the defendant brought a motion to suppress. There was a hearing before the Honorable Jacqueline Shea Brown. The Court denied the defense motion in part because the police had not completed

its investigation and because “the defendant appeared to be suicidal.” As a result, the court believed the police entry into the home was justified under both the emergency and caretaking exception to the warrants clause

At trial Pasco Police Officer Matthew Griffin testified that (1) he heard a woman was being beaten inside the house(2) the man beating the woman was in the downstairs apartment (3) he waited outside the downstairs apartment until back up arrived-which was within a minute (4) he entered the basement with Officer Joshua Glass and Officer Ramos with their weapons drawn. When the three officers entered the basement, they noticed a thirty something year-old man sitting in his bed with two children in his lap. There was no woman present. There was no evidence of any crime. Instead of leaving the apartment, Officer Griffin confronted Edwin Espejo:

“Hey man, you need to come over. Stand up. Crawl to me.” Trial Transcript P. 619 lines 16-20.

Mr. Espejo told the officers to get out. Officer Griffin was asked by Officer Glass if there was a gun. Officer Griffin told Officer Glass there was a gun. Officer Glass never saw a gun before the shooting began. Reserve Officer Dillsworth entered basement under the command of Officer D’Aquila. Mr. Espejo was distraught. He clenched his fist and stood up on the bed. With both his hands he raised his shirt over his head. Trial Transcript P. 686 Lines7-2 The five policemen were within 15 feet of Mr. Espejo. Trial Transcript. P. 624 lines 1-3. At six minutes and forty seconds to midnight, Officer D’Aquila shot his taser at Mr. Espejo. Trial Transcript 686Lines 8-15. The taser struck Mr. Espejo. It was not totally effective. Mr. Espejo fell backward on his bed. Trial Transcript P.689 Lines 1- 25. The following dialogue occurred at trial between Defense Counsel and the police volunteer, David Dillsworth:

Def. Counsel: So, after the taser struck him, he fired the weapon within a second?

Mr. Dillsworth: Yes.

Def. Counsel: You are certain of that.

Mr. Dillsworth: It was very quick. I don't know. One, second, two seconds. It was very quick.

Trial Transcript P. 650

Mr. Dillsworth's accounting of the action was consistent with the testimony of the five officers in the basement. Mr. Espejo stood up on his bed; he had nothing in his hands, he was tased, he fell back. Gun shots were fired almost instantly.

At the close of the prosecution's case, defense counsel moved the court for a directed verdict. Defense counsel argued that the three counts of attempted murder should be dismissed because the defendant did not have enough time to deliberate about his actions when he grabbed his gun. The court denied the defendant's motion and reasoned as follows:

"In considering your motion for a directed verdict the court has in mind State versus Price, which is 103 Wn App 845, a Division II case from 2000. There the discharge of two rounds into the cab of a vehicle that contained individuals was deemed by the court of appeals sufficient information from which a reasonable juror could infer not only intent but premeditation for the same charge. "Trial Transcript P. 1155 Lines 10-17

The court went on to say "In dealing with the issue about whether or not a premeditation can occur within a period of time the court is advised that based on the existing case law no particular period of time is required. The court then looks more specifically at Price.

And the relevant period of time here is the two plus seconds because the taser is on for two seconds. The testimony is that Mr. Espejo fell backwards, and the testimony to date is that he reached for the firearm brought it up and fired.” Trial Transcript P. 1164 Lines 22-25, P. 1165 Lines 1-6

ARGUMENT

ISSUE 1

THE STATE FAILED TO PROVE PREMEDITATION BEYOND A REASONABLE DOUBT AND THE COURT SHOULD HAVE GRANTED THE DEFENDANT’S MOTION FOR A DIRECTED VERDICT ON COUNTS OF ATTEMPTED FIRST-DEGREE MURDER BECAUSE NO REASONABLE JUROR COULD BELIEVE THAT THE DEFENDANT HAD TIME TO DELIBERATE ABOUT HIS ACTIONS.

As defined by the legislature premeditation must “involve more than a moment in a point of time.” **RCW 9A.32.020(i)**. “To establish premeditation the State must show the deliberate formation of and reflection upon the intent to take a human life and involves the mental process before hand of thinking, deliberation, reflection, weighing or reasoning for a period of time however short.” **State v. Hoffman** 116Wn 2dat 82-83. Here, Mr. Espejo stands up and takes his shirt off. He is unarmed. He is tased, falls back, and reacts by grabbing a gun which is at the side of his bed. From the time the taser is deployed to the grabbing of the gun no more than three seconds elapse. Three seconds is not enough time to form a word or have a thought upon which one could deliberate. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which

he is charged.” *In re Winship*, 397U.S. 358, 364. (1970) Here, Mr. Espejo had no time to reflect before he acted. Mr. Espejo was reacting without thought after being shot with an electrified piece of metal which was shaped like a fishhook. Here, the evidence is insufficient to show premeditation. “Premeditation” is an essential element of first-degree murder. Consequently, the three charges for attempted murder in the first degree must be dismissed with prejudice

The court’s reasoning that *Price* stands for the proposition that no time is necessary to form intent makes *Price* contrary to the United States constitution and its due process clause. Price cannot be read to mean that premeditation and deliberation require no time for an actor to think or deliberate. To do so makes first degree murder and second degree murder the same crime. The essential element of premeditation differentiates murder in the first degree from murder in the second degree. See *State v. Hummel* 196 Wn. App. 329, P. 364 (2016),

ISSUE 11

THE COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT’S MOTION TO SUPPRESS BECAUSE THERE IS NO REASONABLE JUSTIFICATION FOR POLICE OFFICERS TO ENTER MR. ESPEJO’S HOME AND TASE IN ORDER TO INVESTIGATE ALLEGATIONS OF DOMESTIC VIOLENCE.

The Fourth Amendment to the United States Constitution states that “the right of the people to be secure in their houses shall not be violated. Article 1, section 7 of the Washington Constitution states that no person shall have his home invaded which is even more protective than the Fourth Amendment. *State v. Groom*, 133 Wn.2d 679, 685(1997). The core of the Fourth Amendment and Article 1, section 7, is the “right of a man to retreat into his own

home and there be free from unreasonable government intrusion. *Silverman v. United States*, 365 U.S. 505,511, 81 S.Ct. 679 L.Ed. 2d 734 (1961). Here a police officer states he was told that a woman was being punched inside the house, other witnesses state there was a verbal disagreement which had ended. No one has told police that any person was threatened with weapons. Officers Griffin, Glass and Ramos decide to enter Mr. Espejo's home without a warrant and with guns drawn even though they no reason to search or arrest Mr. Espejo for anything. Once the officers enter the basement there is no woman in the basement at all and no woman anywhere has said she was hit or beaten Consequently, the police violated Mr. Espejo's right to be free from unreasonable search the moment they entered his home.

In certain circumstances, a law enforcement officer may lawfully arrest a person without an arrest warrant. *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). An officer may conduct a warrantless arrest if the officer has probable cause to believe the arrestee has committed an offense in the officer's presence. *Virginia v. Moore*, 553 U.S. 164, 171-176. Here, Mr. Espejo is legally seized when the police enter his home and point a gun at him. The police point their guns at Mr. Espejo not because he has committed a crime in their presence-he is not breaking any law when the police enter his home-but, are pointing their guns at Mr. Espejo for reasons which are not grounded in logic or common sense. A police officer may make a warrantless arrest if the officer has probable cause to believe the arrestee has committed a felony and the arrest occurs in a public place. Here, Mr. Espejo is arrested in the privacy of his home. *U.S. v. Watson*, 423 U.S. 411,424. (1976)

Probable cause alone is insufficient to justify warrantless entry into a person's home and warrantless arrests in suspects dwellings are presumptively unreasonable. *Ky v. King*, 563 U.S. 452, 459 (2011) Absent consent, only exigencies-such as fear of imminent destruction of

evidence, hot pursuit or immediate threats to the safety of the public can justify warrantless entry into an individual's home to make an arrest. Here, Mr. Espejo did not consent to have the police enter his house; here, there was no hot pursuit nor fear of destruction of evidence of nor threats to public safety. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

Here, the court ruled that the search was reasonable because the police were investigating a crime of domestic violence which created allowed them to make a search to investigate and make sure that all were safe and sound in the house. Once the police entered the basement, they could see that no emergency existed. They had no reason to remain in the basement and they had no probable cause to arrest Mr. Espejo for anything. The court believes the police were entitled to stay to investigate-in other words to question Mr. Espejo. The constitutions of the State of Washington and the United States Constitution prohibit investigating a person in his house against his will. Mr. Espejo makes it clear that he wants to leave. The police respond by tasing him because he will not crawl to them. The court believes the behavior is somehow justified because Mr. Espejo appears to be suicidal.

Under the exclusionary rule, evidence obtained in violation of the Fourth and Fifth Amendment to the United States Constitution may not be introduced at trial as evidence to support a defendant's guilt. *Mapp v. Ohio*, 367 U.S. 643, 654-655. The purpose of the exclusionary rule is to deter police misconduct. *U.S. v. Leon*, 468 U.S. 897, 916 (1984). Here the Pasco Police acted with reckless disregard for the safety of Mr. Espejo. Consequently, any and all evidence collected by the police to prove Mr. Espejo's guilt must be suppressed.

The Derivative Evidence Doctrine makes evidence that was derived from an illegal search or arrest inadmissible. See *Wong Sun v. U.S.* 371, 471 (1963) The entry into Mr. Espejo's house

was illegal and the arrest of Mr. Espejo was illegal. All the evidence seized including but not limited to the gun must be suppressed.

CONCLUSION

The Court of Appeals should dismiss the murder charges against Mr. Espejo because the evidence was insufficient to support his conviction for attempted first degree murder. The weapon charge should also be dismissed because it was found as a result of an illegal search and seizure.

February 6, 2020

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February 06, 2020 - 3:26 PM

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Superior Court Case Number: 17-1-50604-3

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