

No. 64554-141

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUAN FONDUE,

Appellant.

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

The Honorable Helen Halpert

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. Police entry into a third party's home to seize Juan Fondue violated his rights to privacy under article 1, section 7 of the Washington Constitution.

2. Police entry into a third party's home to seize Juan Fondue violated his rights to privacy under the Fourth Amendment to the United States Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Police may enter a residence to serve an arrest warrant only if the entry is reasonable and the police have probable cause to believe the subject of the warrant actually lives in the home and is actually present there at the time of the entry. Here, the police entered a residence with an arrest warrant for Juan Fondue with knowledge only of his presence, but no information suggesting his residence at that address. Was the entry therefore unlawful?

2. Although the police did not have probable cause to believe Mr. Fondue was a resident there, he was an overnight guest in the home. Did he therefore have standing to challenge the entry as an intrusion of his private affairs under both article 1, section 7?

3. As an overnight guest, did Mr. Fondue have a legitimate expectation to privacy in his host's home, and therefore have standing to challenge the entry as a violation of his rights to privacy under the Fourth Amendment?

C. STATEMENT OF THE CASE

On July 13, 2009, Seattle Police Department Officers Larry Longley and Jeffrey Thompson and Student Officer Paul Ducre¹ were dispatched to an address because an anonymous caller had reported that Juan Fondue was there. CP 60. Mr. Fondue had an outstanding felony escape warrant. CP 60. Officers Ducre and Longley viewed a booking photograph of Mr. Longley before responding. CP 61.

Officers Longley and Ducre approached the front door of the residence while Officer Thompson covered the back of the house to make sure the suspect did not flee. RP 9, 38, 57.² Officer Ducre knocked on the door, which was answered by a man later identified as Pedro Leal. RP 9-19. Officer Ducre explained they were

¹ Officer Ducre had been in training for about one month; Officer Longley was his Field Training Officer. RP 6, 9.

² The Verbatim Report of Proceedings contains only two volumes: November 16, 2009 (CrR 3.6 Motion Hearing) and December 1, 2009. (Sentencing). All references to "RP" in this brief refer to the report of November 16, 2009.

looking for someone with a warrant. RP 9. Mr. Leal replied that he and two women were the only people in the house. RP 10. Officer Ducre testified and the trial court found that at this point, he saw a man “pop his head out of the kitchen” toward the back of the house and recognized the man as Mr. Fondue. CP 61; RP 10.

Mr. Leal then walked away from the door and Officers Ducre and Longley followed him into the living room. RP 10. The trial court found they did have permission to enter the house. CP 61. Mr. Leal repeated that no one was there besides himself and two women, and Officer Ducre replied he was lying. RP 28. Mr. Fondue then came out of the kitchen and was arrested on the warrant. CP 61; RP 12, 28. Officer Ducre searched Mr. Fondue incident to the arrest and found cocaine in his pocket. CP 61.

Pedro Leal testified he had been letting Mr. Fondue stay at his house “until he got on his feet.” RP 64-65. In mid-July 2009, Mr. Fondue had been staying in the living room for about a month and a half. RP 78-79.

Following a bench trial on stipulated facts, Mr. Fondue was convicted of possession of cocaine. CP 66-74.

D. ARGUMENT

THE POLICE UNLAWFULLY SEIZED MR. FONDUE IN THE RESIDENCE OF A THIRD PARTY, REQUIRING REVERSAL.

1. The federal and state constitutions require that arrest warrants be based upon probable cause. Under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, sections 3 and 7 of the Washington Constitution, a warrant for arrest may only be issued upon a neutral and detached magistrate's determination that "probable cause exists to say a crime was committed and it was committed by the suspect named in the warrant." State v. Hatchie, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007) (citing State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004)).

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Article 1, § 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without

authority of law.” Both the Fourteenth Amendment³ and Article 1, section 3⁴ guarantee due process of law.

2. The warrant for Mr. Fondue’s arrest did not authorize entry into Mr. Leal’s home. A warrantless entry into a home is presumed unreasonable under both article 1, section 7 and the Fourth Amendment. An arrest warrant “primarily serves to protect an individual from unreasonable seizure,” not to protect privacy rights. Steagald v. United States, 451 U.S. 204, 213, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). Therefore, even if the warrant is valid, “[t]he existence of an arrest warrant and the belief that the subject may be a guest in a third party’s home is insufficient legal authority to enter the home.” State v. Anderson, 105 Wn.App. 223, 231, 19 P.3d 10941 (2001) (citing Steagald, 451 U.S. at 213). An arrest warrant authorizes the police to enter a third party’s home only if

(1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an

³ The Due Process clause of the Fourteenth Amendment provides: “No state shall... deprive any person of life, liberty, or property, without due process of law.”

⁴ Article 1, section 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law.”

actual resident of the home, and (4) said named person is actually present at the time of the entry.

Hatchie, 161 Wn.2d at 392-93. Probable cause exists when the “the facts and circumstances within the arresting officer’s knowledge... are sufficient to warrant a person of reasonable caution” that the subject both resides in and is present in the home. Id. at 404 (quoting State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)). “The information known to the officer must be reasonably trustworthy [and] only facts and knowledge available to the officer at the time of the search should be considered.” State v. Winterstein, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009).

Here, the police did not have probable cause to believe Mr. Fondue resided in Mr. Leal’s home. At the time of the entry, the Officers Longley and Ducre had the following information: First, an anonymous tipster had reported Mr. Fondue was at this address – but the officers knew nothing about this tipster or the basis for her or his knowledge, only that “the complainant called saying that a parole or probation officer had told them that if Mr. Fondue showed up, they were to call police” and “he had been seen within the past two hours.” RP 7, 16, 17, 44, 46-47. Although the officers’ testimony mischaracterized the tip as reporting that Mr. Fondue

“lived” at this address, the dispatch print-out established that the tip only reported his presence. RP 44. Second, Mr. Leal stated he and two women were the only people at home. RP 61. Third, Officer Ducre saw a man fitting Mr. Fondue’s description in the home. RP 61. With these three facts, the officers had probable cause to believe Mr. Fondue was present in the home, but not to believe he actually resided there.

Cases where probable cause was found are instructive. In United States v. Harper, 928 F.2d 894 (9th Cir. 1991), police sought David Harper and identified a home leased to two of his brothers. An “uncorroborated source” reported that David lived there, and through “intermittent surveillance, the police observed David entering the home with his own key once or twice during a three day period.” Id. at 896. The police knew David lived with his family just before his last incarceration and saw car “belonging to known associates of David’s” parked at this address. The Ninth Circuit found, “this information was sufficient to give the police probable cause to believe that David resided there – but just barely.” Id. at 896-97 (emphasis added). Although affirming the conviction, the Court noted, “it would have been far more prudent for the police to have obtained a search warrant.” Id.

The information was “barely” sufficient in Hatchie as well. In that case, Eric Schinnel was the subject of a misdemeanor arrest warrant. 161 Wn.2d at 393. The police found his truck and another vehicle registered to him parked in the driveway of a duplex unit rented by Hatchie. Id. at 394. They spoke to two neighbors; one said he had seen Schinnel there but did not know if he lived there, and the other said if Schinnel’s truck was there he would be there too. Id. The officers knocked on the door for 45 minutes, until another tenant answered. Id. The tenant said he believed Schinnel was “home” but was not sure. The police then announced their presence and entered the home to serve the warrant. The Supreme Court held “[t]hese facts together seem barely enough to suggest to a reasonable person this was Schinnel's residence.” Id. at 405 (emphasis added). Demonstrating how close to the line this case came, the Court added, “[w]ere the two cars registered to the suspect not simultaneously present at the home, showing probable cause would certainly be more problematic.” Id.

Here, the information known to the officers at the time of entry fell far short of that in Hatchie and Harper. There was no indication Mr. Fondue had ever been at this address before or for a long period of time, as neighbors reported in both cases. The

police found no vehicle connected to Mr. Fondue, as in both cases.⁵ No resident suggested Mr. Fondue might live there, as in Hatchie. Mr. Fondue had no previous connection to the house, as in Harper. If direct observation of the subject entering the home with his own key was “just barely” enough information in Harper, then certainly there was not sufficient information here to establish probable cause. Instead, the police only had probable cause to believe Mr. Fondue was there presently, not that he resided there.

Furthermore, no exigent circumstances justified the entry. The police had no reason to suspect a crime was being committed in the house, so there was no danger that evidence would be destroyed. RP 20. The police also had the home surrounded before entering. RP 56. If Mr. Fondue had attempted to flee through either the front or back door, he would have been quickly apprehended and seized with no constitutional problems. There was no reason the police could not wait for a search warrant to enter the home and search for Mr. Fondue with proper authority.

As the Ninth Circuit held in Harper:

There's a simple way for the police to avoid many complex search and seizure problems: Get a search

⁵ Officer Ducre testified the anonymous caller described a car that Mr. Fondue was known to drive, but no car matching that description was seen at Mr. Leal's residence. RP 19.

warrant. Had they obtained a search warrant in this case--as they well could have--there would have been no motion to suppress, no hearing, ... and no thorny issues for us to resolve on appeal. But they didn't. So once again we consume a few pages of the Federal Reporter analyzing the circumstances under which the police may enter a home without a search warrant.

Harper, 928 F.2d at 895.

3. Mr. Fondue may challenge the unlawful entry.

a. As a guest of Mr. Leal, Mr. Fondue has standing to challenge the entry of the residence. Although the police lacked probable cause to believe Mr. Fondue lived in Mr. Leal's home, he was a guest in Mr. Leal's home. As a guest, he had both a reasonable expectation of privacy and the right to be free from intrusion in his private affairs there. He therefore had standing to challenge the unlawful entry under both article 1, section 7 and the Fourth Amendment.

Article 1, section 7 "mandates protection of the person in his private affairs," without considerations of subjective expectations of privacy. State v. Myrick, 102 Wn.2d 506, 513, 688 P.2d 151 (1984) (citing State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The ultimate question is "[w]hether the government's intrusion violated a privacy interest which citizens of this state have

traditionally and justifiably held safe from governmental trespass absent a warrant.” State v. Thorson, 98 Wn. App. 528, 533, 990 P.2d 446 (1999).

Under the Fourth Amendment, a defendant has standing to challenge a search or seizure if he had a “legitimate expectation of privacy” in the location of the entry or search. Minnesota v. Olson, 495 U.S. 91, 95, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). This involves “a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?” California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

The U.S. Supreme Court has held an overnight guest has an expectation of privacy in his host’s home similar to that of the homeowner. Rakas, 495 U.S. at 96-100. This holding “merely recognized the everyday expectations of privacy that we all share.” Id. at 98. “A majority of the [U.S. Supreme] Court’s Justices agree that ‘almost all social guests’ have a reasonable expectation of privacy.” State v. Magneson, 107 Wn.App. 221, 225 n6, 26 P.3d 986, rev. denied, 145 Wn.2d 1013 (2001) (quoting Minnesota v.

Carter, 525 U.S. 83, 109 n.2, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Ginsberg, J., dissenting) (quoting Kennedy, J., concurring)).

In Washington, it is well-settled that “a temporary guest has an expectation of privacy in his or her host’s residence.” State v. White, 141 Wn. App. 128, 140, 168 P.3d 459 (2007) (citing State v. Rison, 116 Wn. App. 955, 959, 69 P.3d 362 (2003); State v. Rodriguez, 65 Wn. App. 409, 415, 828 P.2d 636 (1992); State v. Jungers, 125 Wn. App. 895, 906, 106 P.3d 827 (2005)) (all holding that overnight guests had an expectation of privacy in their hosts’ homes). See also State v. Link, 136 Wn.App. 685, 693 n11, 150 P.3d 610, rev. denied, 160 Wn.2d 1025 (2007) (listing cases from other jurisdictions where overnight guests were found to have standing). In Rodriguez, the Court of Appeals held the defendant had a reasonable expectation of privacy in his mother’s home, where he was a guest, but that expectation was not absolute and was overridden by his mother’s consent to a search. 65 Wn.App. at 414-15. In Link, the Court held the defendant had standing to challenge a search of his host’s apartment, even though he had spent the night there only once or twice before, by examining the following factors: 1) “the defendant’s relationship with the homeowner or tenant,” 2) “the context and duration of the visit

during which the search took place,” 3) “the frequency and duration of the defendant’s previous visits to the home,” 4) “whether the defendant kept personal effects in the home.” Link, 136 Wn.App. at 694-95.

Based on the factors used in Link and the established caselaw, Mr. Fondue’s friendship with Mr. Leal and the uncontroverted testimony that Mr. Fondue had been staying there for about one and a half months establishes legitimate expectation of privacy and private affairs in Mr. Leal’s home.⁶ CP 64-65, 78-79. Mr. Fondue therefore has the right, under article 1, section 7 and the Fourth Amendment, to challenge the unlawful entry.

Any other conclusion allows the invasion of a constitutionally protected interest to be insulated from judicial scrutiny by a technical rule of 'standing'. The inability to assert such an interest threatens all of Washington's citizens, since no other means of deterring illegal searches and seizures is readily available.

State v. Kypreos, 110 Wn.App. 612, 619, 39 P.3d 371 (2002).

⁶ Whether it can be said that Mr. Fondue “resided” in Mr. Leal’s home is immaterial to the question of standing. Mr. Fondue’s status as a guest, is completely separate from the question of residence for the purpose of entry to serve the arrest warrant. The fact that Mr. Fondue had been staying there for a month and a half does not change that the officers did not know, or have probable cause to believe, that fact at the time of their entry.

b. Regardless of standing, this Court should find the entry unlawful to protect the privacy interests of all Washington's citizens. The Supreme Court recently held a search was unlawful where the police lacked probable cause that the defendant lived in the home they searched although it was the defendant, not the homeowner, who challenged the search. Winterstein, 167 Wn.2d 620. Winterstein involved a probationer, not an arrest warrant, but the case is comparable and instructive because a probationer has a lessened expectation of privacy, such that his own home may be subject to warrantless search if the probation officer has a "well-founded or reasonable suspicion of a probation violation." Id. at 628. That lessened expectation of privacy is sufficiently similar to an arrest warrant that the Court in Winterstein relied heavily on Hatchie to hold that in order to search a third party's home for the probationer or evidence of a violation, the probation officer must have probable cause that the probationer lives there and is present at the time of entry. Id. at 630.

Because Winterstein had failed to report to his probation officer and the officer received a tip of a possible methamphetamine lab at the address where Winterstein had last registered his residence, the officer decided to search the

residence for Winterstein and evidence of methamphetamine. Id. at 625. Based on evidence obtained from the search, Winterstein was charged and convicted of unlawful manufacture of methamphetamine. Id. at 626. After the fact, the evidence suggests the defendant may have been living at the residence that was searched. Although Winterstein was not in the residence at the time of the search, his girlfriend was and told the probation officer he still lived there. Id. at 625. Although he had changed his registered address, three weeks prior to the search, to the adjacent motor home, a search of the motor home showed no signs that anyone was living there. Id. at 626. However, at the time of the entry, the probation officer only knew that Winterstein had registered at that address previously and believed he lived there still, and no reason to believe he would be present at the time of entry. Id. Because the trial court did not determine whether the facts known to the probation officer constituted probable cause, the Supreme Court remanded for that determination. Id. at 630-31. In its analysis of the search, the Court took for granted that Winterstein had standing to challenge it.

The Court observed, “unless the third party's interests are considered, the search is no more reasonable than if no warrant

had been issued." Id. at 630 (quoting Hatchie, 161 Wn.2d at 402-03; Anderson, 105 Wn.App. at 232). Therefore, the Court held a probation officer's search of a third party's home, without a valid warrant or probable cause to believe the probationer lives and is present there at the time of the search, would violate the third party homeowner's privacy interests under article 1, section 7. Winterstein, 167 Wn.2d at 630-31. Importantly, the Court did not require a third party homeowner to challenge the search in order to reach this conclusion.

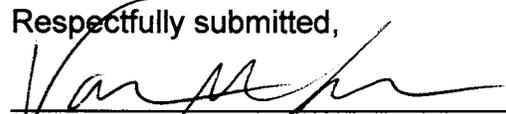
By the same analysis, whether or not Mr. Fondue has standing, the police in this case failed to consider the third party homeowner's privacy interests before entering his home to seize Mr. Fondue. Either way, Mr. Fondue has standing to challenge the search, as an overnight guest of Mr. Leal. This Court should therefore find the search unconstitutional. "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). The resulting conviction should therefore be reversed.

E. CONCLUSION.

For the foregoing reasons Mr. Fondue respectfully requests this Court reverse his conviction.

DATED this 19th day of May, 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 64554-4-I |
| v. |) | |
| |) | |
| JUAN FONDUE, |) | |
| |) | |
| Appellant. |) | |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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