

64554-4

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NO. 64554-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN FONDUE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES

1. Police may lawfully enter a house to seize a person who has an arrest warrant. Fondue had a felony escape arrest warrant. Did police properly enter a house to detain Fondue pursuant to this warrant?

2. A search warrant is necessary when there is a search. An arrest warrant is necessary when there is an arrest. Here, there was no search, only an arrest. Did police need a separate search warrant on top of the valid arrest warrant before they could lawfully seize Fondue?

3. Police may enter a third-party's house when exigent circumstances make getting a search warrant impractical. Here, police knew that Fondue was a violent offender who was wanted on a felony escape warrant. Did exigent circumstances authorize the police to enter the house to arrest Fondue upon seeing Fondue inside?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Juan Fondue was charged by information with Violation of the Uniform Controlled Substances Act: Possession of

Cocaine. CP 1-4. The Honorable Helen Halpert denied Fondue's CrR 3.6 motion to suppress Fondue's seizure, and convicted him as charged by stipulated bench trial. CP 60-65; 1RP¹ 100-03. Fondue now appeals his conviction. CP 75-84.

2. SUBSTANTIVE FACTS

Seattle Police were dispatched to an address after receiving a report that Juan Fondue, who was wanted on a felony escape arrest warrant, was living at the house. CP 60; 1RP 7, 58, 60. The tip came from an anonymous neighbor. 1RP 7, 16, 37. Dispatch provided a physical description of Fondue and the officers viewed Fondue's photograph from an on-line warrant database. 1RP 7-8. Three officers came to the location and parked a safe distance away from the house. 1RP 8-9.

Fondue was known as a "violent offender." 1RP 9. Officers Ducre and Longley went to the front door; Officer Thompson went to the back of the house to provide cover. 1RP 9-10, 58-59. The

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (3.6 Hearing and Stipulated Trial 11/06/09) and 2RP (Sentencing 12/01/09).

officers knocked and Pedro Leal answered the front door. 1RP 9-10. Officer Ducre explained from outside the doorway that they were looking for Fondue and that they had an arrest warrant for Fondue. 1RP 7, 9-10, 16. Leal said that just he and two other women were in the house. 1RP 10. During this conversation, Officer Ducre could see Fondue inside the kitchen of the house. CP 61; 1RP 10-11.

Leal then walked back into the house. 1RP 11. With the door open, but without permission, Officers Ducre and Longley stepped into the house and detained Fondue.² CP 61; 1RP 10-12, 21-22. Officer Ducre asked Fondue for his name, and Fondue said "Michael Johnson." 1RP 12. Police handcuffed Fondue and removed him from the house. 1RP 12. Once outside, Fondue said that he knew he had a warrant and then gave his true name. 1RP 12, 14, 60. Search incident to arrest, police found cocaine in Fondue's pocket. 1RP 14.

² Appellant's Brief states that "the trial court found [police] did have permission to enter the home." Appellant's Brief at 3. This appears to be a typographical error, since the written findings indicate that the police did *not* have permission to enter the home. CP 61.

C. ARGUMENT

1. POLICE PROPERLY SEIZED FONDUE PURSUANT TO HIS ARREST WARRANT.

Police may lawfully arrest someone only upon probable cause and under authority of law. State v. Hatchie, 161 Wn.2d 390, 399, 166 P.3d 698 (2007). An arrest warrant provides the necessary authority of law required by Article I, Section 7. Id. (citing State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). With an arrest warrant police are authorized "the limited ability to enter the residence, find the suspect, arrest him, and leave." Hatchie, 161 Wn.2d at 399. An arrest warrant is separate from a search warrant; thus, police action must be focused on the arrest and may not deviate into a general search of the residence. Id.

In this case, there was a valid arrest warrant for Fondue. CP 60; 1RP 7, 58, 60. Police only came to this house to arrest Fondue pursuant to the arrest warrant. 1RP 7, 9, 16. They did not search the house. 1RP 11-12. Police properly entered the residence for the limited purpose of arresting Fondue, having seen Fondue inside the home.

Fondue does not challenge the search of his person, incident to arrest. Instead, Fondue argues that he was unlawfully seized inside the house. But authority to enter a residence and detain a person is inherent to an arrest warrant. Steagald v. United States, 451 U.S. 204, 214 n.7, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981); see Hatchie, 161 Wn.2d at 399.; Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The issuance of an arrest warrant makes the seizure of that person lawful. Steagald, 451 U.S. at 213. Because police seized Fondue pursuant to an arrest warrant, Fondue's seizure was lawful.

2. POLICE PROPERLY ENTERED THE HOUSE TO SEIZE FONDUE.

Fondue does not contest that police can lawfully enter his house and arrest him pursuant an arrest warrant. Fondue claims that because police arrested him while he was at a friend's house, he was unlawfully seized. Because Fondue improperly conflates his right to be free from unlawful seizure with another's separate privacy rights, his claim fails.

a. There Was No Search.

Fondue argues that police needed a search warrant before seizing him. Police did not search the house, and if police had, it would not affect the lawfulness of the seizure. Fondue erroneously relies on cases where evidence is suppressed after police perform warrantless searches of third-party homes.

Fondue first cites Anderson to claim that the "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." Appellant's Brief at 5 (quoting State v. Anderson, 105 Wn. App. 223, 231, 19 P.3d 1094) (2001). However, Anderson, as the home owner, was asserting *his* privacy rights after police searched his house and found drugs. Id. at 226. The search came *after* police arrested houseguest Joshua Edwards on a warrant. Id. at 226-27.

Police suspected that it was Anderson who was manufacturing methamphetamine at his house. Id. at 226. Police knew that Edwards had been at Anderson's house, though they were not sure if Edwards was still there. Id. at 226-27. Relying on Edwards's arrest warrant, several officers came to Anderson's house with semi-automatic weapons drawn, kicked in the door, and demanded everyone to the ground. Id. at 227-28. Edwards

happened to be there, but this fact was immaterial. Id. at 230-31. The Court took issue with the forceful nature of the entry and the later search of the house, which relied entirely on Edwards's misdemeanor warrant to justify the intrusion. Id. at 231-32.

The Anderson Court held that a valid search warrant was needed because "To allow an arrest warrant for a non-violent misdemeanor to create *carte blanche* for searching the homes of third parties creates the risk of the sort of abuse complained of here: using the arrest warrant as a pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." Id. at 232 (citing Steagald, 451 U.S. at 215). Accordingly, the evidence found during the search of Anderson's home could not be used against Anderson at trial because the search violated Anderson's privacy rights.

In the present case, police did not enter the house to arrest Fondue as part of a pretextual search. There was no forced entry. Police did not search the house for Fondue; they simply saw him, took him into custody, and left. This type of limited entry is permitted to accomplish an arrest. See supra § C.1.

Fondue's reliance on Hatchie is similarly misplaced. To protect the homeowner's privacy rights, our Supreme Court has held that evidence from a search is admissible at trial 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 actual resident of the home, and (4) said named person is actually present at the time of entry." Hatchie, 11 Wn.2d 392-93.

In Hatchie, police were looking for Eric Schinnell, who had made suspicious store purchases. Hatchie, 11 Wn.2d 392-93. Knowing that Schinnell had a misdemeanor warrant, police sought to arrest him. Id. at 393. Police found two cars registered to him at a house, and neighbors and a roommate confirmed that they had seen Schinnell at "home" earlier that day. Id. Police entered the house without permission and began to search the house for Schinnell. Id. at 393. Police ultimately found him hiding under a truck in the garage. Id. While searching the house for Schinnell, police came across methamphetamine evidence. Id. at 393-94. The *homeowner*, Hatchie, was ultimately charged for the drugs, and moved to suppress the evidence. Id. at 394.

Our Supreme Court reiterated that our federal and state constitutions allow police to enter a house to execute an arrest warrant. Id. at 397-99. However, as in Anderson, the Court expressed concern that police might abuse this authority and thus the Court "point[ed] out an arrest warrant does not allow for a general search of the premises." Id. at 400. Entry into the residence must also be reasonable, in order to limit the intrusion, and police cannot use the arrest warrant as a pretext to search the house. Id. at 402. The court reasoned that only when police "enter the residence, find the suspect, arrest him, and leave," are police acting within their authority pursuant to an arrest warrant. Id. at 400.

Hatchie claimed that his privacy rights were separate from Schinnell's, per Steagald, and our Supreme Court agreed. In Steagald, the U.S. Supreme Court held that police can perform a warrantless *search* of a third-party's house only with the homeowner's consent or as a result of exigent circumstances. Steagald, 451 U.S. at 213-14. The U.S. Supreme Court stated that whether police are searching for contraband or a person, the homeowner maintains her privacy rights. Id. Thus, while an arrest warrant makes the seizure of the person sought lawful; a third party

can still assert her own privacy rights and suppress evidence, since a search warrant is necessary for a search of another's house. Id. Accordingly, the Supreme Court held that the evidence found in Steagald's house, while police were searching for another man, was unlawfully obtained and could not be used against Steagald at trial. Id.

The Hatchie Court agreed that Hatchie's privacy rights were implicated but held that the evidence that police came across while searching for Schinnell was admissible against Hatchie because police entered the house in good faith. The Hatchie Court referenced LaFave, who summarized Steagald that holds that when police find evidence in a third-party's house while searching for someone who has a warrant, the evidence found is admissible against the third-party if police reasonably believed that the person police sought lived in the house police entered. 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.1(b), at 275, 279-88 (4th ed.2004). The Hatchie Court equated this "reasonable belief" to mean that there must be probable cause. Hatchie, 11 Wn.2d 404. As such, the evidence found in a house search is still admissible against the homeowner, even without a search warrant, if police had probable cause to believe that the person sought lived at the

house searched. Id. at 404-05. As such, the evidence was admitted against Hatchie.

Contrary to Fondue's claim, Hatchie does not make Fondue immune from seizure just because he was not at his own house. Hatchie allows a homeowner to suppress evidence at trial if it was found in an unjustified search of the house. In this case, unlike in Anderson and Hatchie, there was no search. Police simply stepped into the residence, took Fondue into custody, and left. This action was authorized by the arrest warrant. Supra § C.1.

Finally, Fondue cites United States v. Harper, 928 F.2d 894 (9th Cir. 1991). Like the other cases referenced by Fondue, Harper involves an attempt to suppress evidence found in a search. Police entered and searched what they thought was the new home of David Harper, who was wanted on an arrest warrant. Harper, 928 F.2d at 895. Some officers went upstairs, where they found David, but not much else. Id. Other officers went downstairs and forced entry into an apartment unit belonging to David's brother, Adrian Harper. Id. In Adrian's apartment, police came across cocaine in various forms, which the co-defendant brothers acknowledged dealing. Id. at 895-96.

The issue in Harper was whether there was sufficient probable cause to believe David Harper lived at the residence. Police had relied on an uncorroborated tip that David was living at the house. Id. at 896-97. Before going to prison, David lived elsewhere, but police recently saw David and his associates visiting the house. Id. Knowing that David's brothers lived in the house and that his family owned the property, police believed that David also now lived there. Id.

The court admitted the evidence found in Adrian's apartment, holding that the information police had was sufficient to believe that David lived in the house, per Steagald. Id. at 896. Thus, no search warrant was necessary. Harper, 928 F.2d at 897. The Harper Court reiterated that a search warrant is always a better option, and cited Perez, which restated that an arrest warrant only assures that the seizure of the wanted suspect is lawful, while a search warrant assures that the search of the property is lawful. Perez v. Simmons, 884 F.2d 1136, 1140 (9th Cir. 1989) (citing Steagald, 451 U.S. at 213).

As in Harper, police had reason to believe that Fondue was living at the house. Dispatch reported to police that Fondue was living at the house, based on an anonymous neighbor's tip. 1RP 7,

16, 37. When Leal answered the front door police saw Fondue in the kitchen. 1RP 10-12. The fact Fondue was now seen in the house validated the report that Fondue lived there. Thus, even if police had searched the house, any evidence found would be admissible based upon this probable cause. Nevertheless, since there was no search here, no search warrant was necessary.

b. Fondue Lacks Standing To Challenge The Entry.

Fondue argues that as an "overnight guest" at Leal's house Fondue has standing to challenge the police entry into the house. Because Fondue was seized pursuant to a valid arrest warrant, he has no standing to challenge the entry.

This exact issue was resolved by our Supreme Court in State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000). If a defendant is arrested pursuant to a warrant, he has no standing to challenge an illegal entry by police, no matter his expectation of privacy in that house. Id. at 20-22. After being arrested due to a warrant, any subsequent search of the defendant incident to arrest bears no direct relationship to the illegal entry of the third party's house. Id. at 22-23.

The facts of Williams almost mirror this case. In Williams, police received a citizen tip that Williams had a warrant for his arrest and was currently at a local residence. Id. at 19. Police drove to this house and contacted the homeowner at the front door, telling the homeowner that they were looking for Williams because he had a warrant. Id. at 20. The homeowner claimed that he did not know Williams and let police search his house. Id. After entering the house, police spotted Williams and arrested him on his warrant. Id. In a search incident to arrest, police found heroin in Williams's pocket. Id. Williams argued that entry into the house was illegal because Ferrier warnings were not given before entry. Id.

Our Supreme Court held that regardless of the legality or illegality of the entry, Williams had no standing to challenge the entry. Id. at 20-23. Even if Williams had a reasonable expectation of privacy in the house as an overnight guest, his search was unrelated to the entry into the house. Id. at 23-24. The court cited Steagald and Payton to hold that "an arrest warrant 'authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home.'" Id. at 23-24 (quoting Steagald, 451 U.S. at 214 n.7; Payton, 445 U.S. at 603). Because

an arrest warrant is issued after a judicial officer has found that an arrest is justified, "it is constitutionally reasonable to require [the defendant] to open his doors to the officers of the law." Williams, 142 Wn.2d at 24. As such, the court held:

Thus, even if Williams had standing in his own right, he would be unable to successfully challenge a police entry of his own home to serve an arrest warrant. We find no reason to confer additional privacy protections to suspects who are arrested in other person's homes. We agree with the Ninth Circuit's observation that "[i]f an arrest warrant and reason to believe the person named in the warrant is present are sufficient to protect that person's fourth amendment privacy rights in his own home, they necessarily suffice to protect his privacy rights in the home of another." United States v. Underwood, 717 F.2d 482, 484 (9th Cir. 1983).

Id. at 24.

Just like Williams, Fondue was a guest in the house of a third party. Whether Fondue was in his own house or the house of another, his seizure was lawful pursuant to the valid arrest warrant. Fondue's privacy rights were not implicated by the entry, since he was seized pursuant to a valid arrest warrant. Thus, Fondue has no standing to bring this claim.

Fondue on appeal does not address Williams. Instead, he cites various cases that generally hold that overnight guests have expectations of privacy while in their hosts' houses. Appellant's

Brief 10-13. However, Williams holds that whether or not Fondue had an expectation of privacy immaterial; he does not have standing to challenge the entry. Supra.

Fondue next argues that he does not need standing. He argues that he can simply assert the rights of the homeowner to make his claim. Fondue's reliance on State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009), is misplaced.

In Winterstein, our Supreme Court held that before a probation officer searches a house he must have probable cause that a probationer lives in that house, if it is not the probationer's actual listed residence. A probation officer may only search a probationer's *actual* residence because the statute authorizing the search is limited to the "person, residence, automobile, or other personal property" of the probationer. Winterstein, 167 Wn.2d at 630 n.2 (quoting RCW 9.94A.631). In Winterstein, the probation officer inadvertently searched the house next door to Winterstein's actual residence. Id. at 629-30. The court held that without probable cause that a probationer lives at the house searched, a warrantless search of another's house is without authority of law. Id. at 630-31.

Winterstein addresses the unique constitutional challenges associated with a probation officer's statutory authority to perform warrantless searches at their discretion. Our case does not involve a warrantless search by a probation officer. Police seized Fondue pursuant to a warrant. An arrest warrant provides the authority of law that was missing in Winterstein. Supra § C.1. Indeed, our Supreme Court rejected the argument that the state constitution provides more protection than the federal constitution to a person who is seized pursuant to an arrest warrant while he is in another's home. Williams, 142 Wn.2d at 24-25. Thus, Winterstein is inapposite. Fondue cannot challenge the entry by police.

3. POLICE PROPERLY ENTERED THE HOUSE
PURSUANT TO EXIGENT CIRCUMSTANCES.

Police may enter and even search a third-party house without a warrant or probable cause when exigent circumstances require this quick action. Exigent circumstances existed here when the police had a violent, escaped felon in sight.

When exigent circumstances require it, police are authorized to enter and search a third-party's house. Steagald, 451 U.S. at 216. The situation must be more than a routine desire to search for

a suspect; police must have an immediate need to detain a person who has an arrest warrant. Id. at 218.

"Exigent circumstances" involve a true emergency that requires swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence. State v. Hinshaw, 149 Wn. App. 747, 753, 205 P.3d 178 (2009) (citing Michigan v. Tyler, 436 U.S. 499, 509-10, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)). The exigent circumstances exception to the search warrant requirement is meant for situations where police lack adequate time to get a warrant. Id. at 754. Police bear the heavy burden of establishing that quick police action was necessary and why it was impractical or unsafe to take the time to get a warrant. Id.

To evaluate whether an emergency existed, eleven factors are considered. Id. Not all of these factors need to be satisfied in order to conclude that police had to act immediate:

- (1) the gravity of the offense, particularly whether it is violent;
- (2) whether the suspect is reasonably believed to be armed;
- (3) whether police have reasonably trustworthy information that the suspect is guilty;
- (4) there is strong reason to believe that the suspect is on the premises;
- (5) the suspect is likely to escape if not swiftly apprehended;
- (6) the entry is made peacefully;
- (7) the police are in hot pursuit;
- (8) the suspect is fleeing;
- (9) the officers or public are

in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence.

Id. (citing State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)).

Here, police were confronted with the unique situation that the man wanted on a warrant was suddenly in front of them. Fondue was known to police to be a "violent offender." 1RP 9, 12, 58. For this reason, police were exercising more caution than usual in approaching the house. Id. Accordingly, the first factor related to the violent nature of the offense, or in our case, the violent nature of the offender, is met.

Second, police had reason to believe that Fondue could become armed. Because Fondue was in the kitchen, police were concerned that he could arm himself with knives as a weapon. 1RP 11.

Third, Fondue was wanted on an arrest warrant for escaping from custody. Police had trustworthy information that Fondue was wanted for an unlawful escape; there was a judicial order establishing his guilt. 1RP 9, 58.

Fourth, Fondue was not only on the premises, but he was actually in front of them. 1RP 10, 15.

Fifth, police sought to arrest Fondue pursuant to a felony escape warrant. 1RP 58. The very nature of their investigation was an effort to arrest Fondue for escape. When police announced to Leal that they sought someone on a warrant, Fondue poked his head out of the kitchen but pulled his head back when police mentioned Fondue's name specifically. 1RP 10-12, 15, 28-31. The fact that Fondue did not voluntarily come forward made further escape likely.

Sixth, the entry was made peacefully. When police arrived, they parked their patrol vehicle away from house. 1RP 9. Police did not break down the door. 1RP 9-10. Police stepped inside, albeit without permission, only after Leal opened up the doorway by walking back inside. 1RP 10.

Seventh, police were attempting to apprehend Fondue pursuant to a warrant. While this was not an active chase, the attempt to apprehend Fondue on a felony escape warrant was equivalent to a pursuit.

Eighth, while Fondue was not physically fleeing police when police stepped into the house, the nature of an escape warrant indicated that further flight was possible, if not likely.

Ninth, police were concerned for their safety in dealing with Fondue. 1RP 9. At the outset, they parked their patrol car away from the house because of the danger Fondue posed as a violent offender. Id. They were particularly concerned for their safety upon seeing Fondue in the kitchen, since he now had access to knives. 1RP 9-11. Leal's false statement about Fondue not being there added concerns about the mounting danger of the situation. Police needed to act quickly, detain Fondue, and then leave before the situation escalated.

Tenth, while Fondue did not have his car at the house, there were cars in the driveway. 1RP 18-19. Police could not know if Fondue had access to these vehicles. Since police were away from their patrol car, there was a need to detain Fondue before Fondue could go outside.

Finally, there was a risk that if police did not act quickly they would lose evidence in this case. Ultimately, the cocaine evidence that Fondue now seeks to suppress was on his person. It could

easily have been swallowed, hidden, sloughed, or destroyed, if not for the quick action by police. Such immediate response was necessary to secure him and any weapons or evidence he had on him.

While not all factors need to be satisfied to establish exigent circumstances, the fact that nearly all existed when police entered the house, makes the quick response by police necessary. There was no time for police to get a search warrant; police needed to react quickly and detain Fondue before the situation escalated. By harboring Fondue and lying to police, Leal's own complicity added more danger to the situation. To require the police to wait at the front door while they obtained a search warrant would be impractical and would make a volatile situation more unsafe for police and those in the house. To leave the house and return later with a search warrant would be equally absurd and virtually guarantee Fondue's further escape. Focused, swift action was required by police to detain Fondue and remove him from the house. Police properly entered the house for this singular purpose.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Fondue's conviction.

DATED this 28th day of July, 2010.

Respectfully submitted,

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