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NO. 68535-0-1

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

STATE OF WASHINGTON,

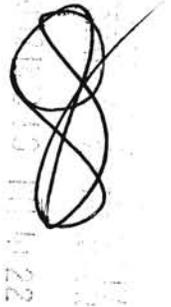
Respondent,

v.

ADREN COLEMAN,

Appellant.

REC'D
DEC 13 2012
King County Prosecutor
Appellate Unit



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

The Honorable Beth M. Andrus, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, appellant Adren Coleman asserts he was denied effective assistance of counsel when trial counsel failed to recognize it was the defense's burden to establish social-guest standing when challenging the warrantless entry of another's apartment. Brief of Appellant (BOA) at 8-14. In response, the State appears to concede counsel's performance was objectively unreasonable. Brief of Respondent (BOR) at 14-15. It claims, however, that Coleman cannot show prejudice. BOR at 15-21. Specifically, the State claims that even if defense counsel had offered Patricia Brown's (Patricia) testimony during the 3.6 hearing, there was not a reasonable probability the trial court would have found Coleman had social-guest standing. BOR at 15. For reasons stated in appellant's opening brief (BOA at 13-14) and below, the State is incorrect.

First, the analysis should start with the premise that "[a]lmost all social guests have a reasonable expectation of privacy." State v. Link, 136 Wn. App. 685, 693, 150 P.3d 610 (2007) (citations omitted). While the trial court and the State correctly point out that

a person does not have a reasonable expectation of privacy in the apartment of a domestic violence victim whom the defendant is prohibited from contacting,¹ the relevant question here is not whether Coleman had a legitimate expectation of privacy in Tara Brown's apartment. The relevant question is whether Coleman had a reasonable expectation of privacy in Patricia's apartment. Because there was not a no-contact order in place between Coleman and Patricia and because Coleman was permitted by court order to visit his children in Patricia's apartment, Jacobs does not apply here.²

The salient question here is whether there is a reasonable probability that the trial court's analysis under the factors set forth in

¹ CP 91; BOR at 16-17 – both citing State v. Jacobs, 101 Wn. App. 80, 87, 2 P.3d 974 (2000)).

² The trial court's findings indicate it recognized Jacobs was not controlling as to the issue of Coleman's privacy expectation in Patricia's home:

Under Jacobs ... the defendant does not have a reasonable expectation of privacy in the apartment of a domestic violence victim whom the defendant is prohibited from contacting. In this case, the defendant also had no expectation of privacy in Patricia Brown's apartment.

CP 91 (emphasis added).

State v. Link³ would have differed had defense counsel affirmatively presented Patricia's testimony at the 3.6 hearing rather than making a last-minute offer of proof that was rejected by the court. As argued in appellant's opening brief, the answer is yes. BOA at 13-14.

Link is instructive. There, the Court held that Link possessed social-guest standing while visiting his girlfriend's apartment. Link, 136 Wn. App. at 692. As it must, the State attempts to factually distinguish Link. It points out that, unlike here, Link was at his girlfriend's home – a home for which he possessed a key and where he kept personal items, showered, and sometimes stayed without his girlfriend. BOR at 694-95. While these facts suggest a closer nexus between Link and the residence he was visiting than exists between Coleman and Patricia's residence, the State overlooks the fact that Link cites favorably to United States v.

³ These factors include: (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; and (4) whether the defendant kept personal effects in the home. Link, 136 Wn. App. at 692-93. These four factors are relevant, but not exhaustive, guidelines for the ultimate question of whether the defendant was a social guest with a reasonable expectation of privacy in the home. Id.

Fields, 113 F.3d 313 (2d Cir.1997), where the defendant was far less connected to the apartment. Link, 136 Wn. App. at 694, n. 11.

Fields demonstrates that the requisite nexus between the defendant and the home he is visiting is far less tight than the State suggests. There, the Second Circuit Court of Appeals found Fields was a social guest based only on the fact Fields was invited as a guest by someone who was authorized to have guests at the house and the fact Fields had spent several hours there before police arrived. Fields, 113 F.3d at 321.

The record here shows there existed a significantly greater nexus between Coleman and Patricia's residence than was required in Fields. Had defense counsel realized it was her burden to establish standing via Patricia's live testimony (rather than trying to make a last-minute offer of proof), the trial court would have heard that Coleman had a history of visiting his children there,⁴ he was visiting that day,⁵ was considered by Patricia to be like a son-

⁴ Importantly, as a significant factor in reaching its decision that Coleman lacked standing, the trial court expressly pointed to the defense's failure to produce evidence showing Coleman had made prior visits to Patricia's apartment to visit his children. CP 91.

⁵ The State also states "The purpose of Coleman's visit on that day was not to visit his children." BOR at 20 (no citation). Again, the trial court did not enter a written finding to that effect. CP 89-92.

in-law, sometimes arrived at the apartment without calling, and brought groceries to the house when visiting. 3RP 30, 31, 35 36. Had the trial court heard this evidence, it is reasonably probable Coleman – like Fields – could have established social-guest standing. See also, BOA at 13-14.

For these reasons and those in appellant's opening brief, this Court should reject the State's argument, and find Coleman was denied effective assistance of counsel. See, Link, 136 Wn. App. at 693; Fields, 113 F.3d at 321.

II. THE TRIAL COURT ERRED IN CONCLUDING THE EMERGENCY-AID EXCEPTION APPLIED.

In his opening brief, appellant asserts the trial court also erred when it concluded the emergency-aid exception to the warrant requirement applied. BOA at 14-18. In response, the State strongly suggests this Court should find the Washington Supreme Court did not mean what it said in State v. Schultz, 170 Wn.2d 746, 754, 248 P.3d 484 (2011), when it expressly stated that before the emergency-aid exception is to be applied the State "must show... (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons

or property are in need of immediate help for health or safety reasons.”⁶ BOR at 25, 30-32. Instead, the State suggests that this Court should apply a more generalized standard and simply “balance the individual’s privacy interests against the public’s interest in having the police perform their community caretaking function.” BOR at 25 (citing State v. Hos, 154 Wn. App. 238, 246-47, 225 P.3d 389 (2010)). For reasons stated below, this Court should reject this argument.

The State urges this Court to ignore Schultz factors (4) and (5) and instead consider the “likely scenarios faced by officers” and other Washington appellate court cases that preceded Schultz in order to uphold the trial court’s ruling. There are two problems with this. First, the Supreme Court presumably was well aware of these precedents and the likely scenarios faced by officers when it decided Schultz and chose to adopt factors (4) and (5). Second,

⁶ Schultz set forth the following six factors: “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; (3) there was a reasonable basis to associate the need for assistance with the place being searched; (4) there was an imminent threat of substantial injury to persons or property; (5) state agents believed a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency was not a mere pretext for an evidentiary search. Id. at 754-55.

this Court is bound by Schultz. See, State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

Moreover, in its attempt to circumvent the requirements of Schultz, the State misrepresents the case law cited by the Washington Supreme Court when adopting factors (4) and (5). See, Schultz, 170 Wn.2d at 754 (citing State v. Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007) and State v. Lawson, 135 Wn. App. 430, 437, 144 P.3d 377 (2006)). The State claims Leffler and Lawson merely stand for the proposition that “a general concern for the community that is not of an imminent nature is not sufficient to establish the emergency-aid exception.” BOR at 27. However, the plain language of Leffler reveal this to be incorrect. Leffler sets forth the following:

A survey of Washington law reveals two factors that must be present for the emergency exception to apply. First, there must be a substantial risk of serious injury to persons or property.... Lawson, 135 Wn. App. at 437, 144 P.3d 377 (emergency exception did not justify warrantless search where deputies did not ask about defendant's well-being and had no information that anyone was injured and in need of immediate help)....

Second, the risk to persons or property must be imminent. ...

In sum, the emergency exception only applies where there is an imminent threat of substantial injury to persons or property.

Leffler, 142 Wn. App. at 183 (other citations omitted). Thus, contrary to the State's argument, Leffler's explicit language supports the strict application of Schultz factors (4) and (5), not the generalized standard for which the State advocates

The State also suggests this Court should follow the holdings in State v. Lund, State v. Gocken, and State v. Menz – cases where the emergency exception applied. BOR at 25-28, 31. However, those cases predated Schultz and, thus, only applied the first three factors of the Schultz test. State v. Lund, 54 Wn. App. 18, 21, 771 P.2d (1989); State v. Gocken, 71 Wn. App. 267, 277, 857 P.2d 1074 (1993); State v. Menz, 75 Wn. App. 351, 354, 880 P.2d 48 (1994). Consequently, these cases are not helpful in interpreting and applying Schultz factors (4) and (5).

Finally, the State glosses over the fact that it failed to secure the necessary findings of fact to meet its burden that would enable this Court to conclude the emergency-aid exception applies. "In the absence of a finding on a factual issue this Court must indulge the presumption that the party with the burden of proof

failed to sustain their burden on this issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The State never procured a factual finding establishing that officers reasonably believed there was an imminent threat of substantial injury to Brown or that she was in need of immediate help for health or safety reasons. Instead, the trial court’s findings expressly say that officers felt it was not wise to leave the scene “due to the potential danger” (CP 90, emphasis added) and that officers subjectively believed that Brown “was in need of assistance to ensure her safety.” CP 92. However, belief that there is “potential danger” is not the same as a belief that there is imminent danger. And belief that someone is in “need of assistance” does not establish there was a need for immediate help.

More importantly, the fact that officers waited patiently for 15 minutes without taking action to check on Brown (CP 90) undermines any notion that these officers reasonably believed there was an imminent threat of substantial danger to Brown or that Brown needed immediate help. No reasonable officer who genuinely believed that Brown needed immediate help or was in imminent danger of substantial injury would just stand outside the apartment door for fifteen minutes and wait for a key simply

because they did not want to damage the door upon entry. Based on this record, the State failed to demonstrate the urgency contemplated in Schultz factors (4) and (5).

In sum, as Schultz explicitly states, the State must establish that “the police had a reasonable belief that all the elements of the emergency aid exception were satisfied” and “failure to meet any factor is fatal.” Schultz, 170 Wn.2d at 760. Without factual findings establishing that police reasonably believed the threat of substantial injury to Brown was imminent or the Brown’s need of assistance was immediate, this Court must presume the State failed to establish these facts and, thus, failed to meet its burden. Accordingly, this Court should find the trial court erred when it failed to suppress evidence that was the fruit of this unlawful entry.

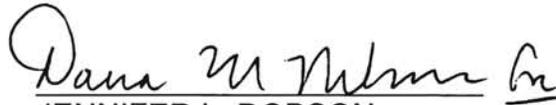
B. CONCLUSION

For reasons stated herein and in appellant's opening brief,
this court should reverse.

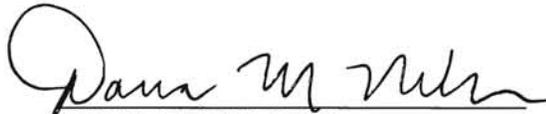
DATED this 13th day of December, 2012.

Respectfully submitted,

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