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No. 68828-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Jon Moore,

Appellant.

Snohomish County Superior Court

Cause No. 11-1-01356-6

The Honorable Judge Janice E. Ellis

Appellant's Opening Brief

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COURT OF APPEALS
STATE OF WASHINGTON
CHRISTOPHER J. MOORE

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ASSIGNMENTS OF ERROR

1. The officers violated Mr. Moore's right to privacy under Article I, Section 7 of the Washington State Constitution.
2. The trial court erred by failing to suppress items seized from Mr. Moore's residence.
3. Officer Vermeulen unlawfully entered Mr. Moore's residence without a warrant.
4. Officer Xiong unlawfully entered Mr. Moore's residence without a warrant.
5. The officers violated Mr. Moore's right to be free from unreasonable searches and seizures under the Fourth Amendment.
6. The trial judge erred by entering in entering the following conclusions of law:

The court finds that the Officers involved in this case acted with lawful authority in entering the defendant's home.

1) Officers here confirmed they were at the correct location and had a duty to complete their responsibilities in ascertaining the safety of the domestic violence victim. The Court finds that the Officers subjectively believed that someone was likely in need of assistance for health or safety concerns and that they had a reasonable basis to determine if Ms. Brockman was at the residence (they had confirmed that the residence was her boyfriend's and that she had been there earlier).

2) ...The court finds that a reasonable person in these Officers' situation would similarly believe that there was a need for assistance.

3) The Officers were dispatched to a specific location and the defendant had confirmed pieces of information that Officers had received from dispatch which the Court finds led these Officers to have a reasonable basis to associate the need for assistance with the defendant's home.

4) The information that the Officers received was that there was a domestic violence hang up call and the victim was no longer responding to attempts to get her on the phone. Further information was that the victim was crying, the reporting party heard a disturbance and yelling and the line went dead. The Court finds that there was a very real potential that the victim could have been subject to imminent harm and that the officers had a professional responsibility to rule out such a threat.

5) ...The Court finds that Officers were looking for a specific person who they felt was in need of assistance.

6) Given the Officers' detailed training and experience regarding domestic violence situations and victims, the officers were compelled to conduct a protective sweep of the residence.

7. The trial judge erred by denying Mr. Moore's motion to suppress.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

After receiving a report from an anonymous caller, "Bill Grant," regarding a phone call he'd received from Shiloh Brockman regarding a domestic disturbance at Christopher Moore's residence, Officers Vermeulen and Xiong went to Mr. Moore's residence to investigate. When they arrived they noticed nothing out of the ordinary. They heard no yelling, they saw no signs of any

disturbance. The officers knocked on the door. Mr. Moore opened the door. The officers noticed nothing out of the ordinary. There were no signs of any physical disturbance. Mr. Moore's two children were on the couch watching television. They showed no signs of distress. The officers entered the residence and Officer Xiong immediately searched the house. Officer Xiong observed marijuana plants in one of the rooms he searched. Mr. Moore was arrested, and the officers obtained a search warrant to search for evidence of drugs and drug sales.

1. Did Officer Vermeulen's warrantless entry into the residence violate Mr. Moore's state constitutional right to privacy under Article I, Section 7? Assignments of Error Nos. 1-7.

2. Did Officer Xiong's warrantless entry into the residence violate Mr. Moore's state constitutional right to privacy under Article I, Section 7? Assignments of Error Nos. 1-7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

An anonymous person called the police, reporting that he had received a call from Shiloh Brockman that she was involved in a fight. RP (3/16/12) 6-7, 20-21, 28. Officers Vermeulen and Xiong were dispatched to Mr. Moore's residence to investigate. RP (3/16/12) 6, 20, 28. The officers had no other information when responding to the residence. RP (3/16/12) 7, 20-21.

When the officers arrived they went to the front door and knocked on it. RP (3/12/16) 8, 21. Mr. Moore answered the door and identified himself when asked. RP (3/16/12) 8, 21. Officer Vermeulen asked if they could step inside to talk to Mr. Moore and he allowed them in. RP (3/16/12) 8, 22. When he entered the house, Officer Vermeulen noted nothing out of the ordinary; a fairly empty front room with a living room off to the side. RP (3/16/12) 8-9. There were two children in the family room sitting on the couch. RP (3/16/12) 9. The children were sitting on the couch watching television. RP (3/16/12) 9. They did not appear to be distressed. RP (3/16/12) 9.

Once Officer Vermeulen and Xiong were inside, Officer Vermeulen continued talking to Mr. Moore while Officer Xiong did a protective sweep of the house. RP (3/16/12) 9. Inside the residence

Mr. Moore told Officer Vermeulen that he had a girlfriend named Shiloh Brockman, that she was not at the house, that she lived with her father, and that he didn't know where she was. RP (3/16/12) 9-10, 22. When asked, Mr. Moore also stated that night he'd had an argument with Ms. Brockman and that she'd left. RP (3/16/12) 10.

At this point Officer Vermeulen tried to call the reporting party. RP (3/16/12) 10. He was unable to do so. RP (3/16/12) 10. Shortly thereafter dispatch reported new information they'd received from the reporting party, identified as Bill Grant. RP (3/16/12) 11-13. Dispatch informed officers that "Bill" told dispatch that Shiloh called him from her cell phone and said that she told him, quote, he beat the shit out of me. RP (3/16/12) 12. Bill reported that he asked who, and Shiloh said, you know who it was. RP (3/16/12) 12. Chris. RP (3/16/12) 12. Bill then reported that he heard some screaming and yelling in the background and the phone went dead so he called 911. RP (3/16/12) 12-13. Officer Vermeulen was given Ms. Brockman's cell phone number but when it was called no one picked up. RP (3/16/12) 13. Based on this information officers kicked in several locked doors at Mr. Moore's residence. RP (3/16/12) 13-14.

Officer Vermeulen later made contact with "Bill Grant." RP (3/16/12) 15. Bill Grant's real name is William Hussey. RP (3/16/12) 15. Officer Vermeulen had had previous contact with Mr. Hussey in his duties as a law enforcement officer. RP (3/16/12) 15-16. Officer Xiong didn't know Bill Grant and had never had any contact with him before this date. RP (3/16/12) 25.

Mr. Moore was charged by Information with Manufacture of a Controlled Substance. CP 28-29. He demanded a 3.6 hearing, arguing that the initial entry was unlawful. At that hearing, the court ruled the evidence was admissible, and made findings of fact, that included the following

Upon request, the defendant identified himself immediately to Officers as Christopher Moore. Officer Vermeulen asked if they could come inside and talk and the defendant responded, "Sure." Once inside Officer Vermeulen spoke with Mr. Moore while Officer Xiong began a protective sweep of the residence.

Officers noted that the defendant appeared calm, as did two children who were seated in an adjacent family room watching TV. Officers noted that nothing appeared out of the ordinary inside the residence.
CP 14-15.

In support of its decision to admit the evidence, the court entered the following conclusions of law:

State v. Schultz, 170 Wn.2d 746 (2011) controls the Court's analysis in this case. The Court finds that the Officers involved in this case acted with lawful authority in entering the defendant's home.

...The Court finds that the Officers subjectively believed that someone was likely in need of assistance for health or safety concerns and that they had a reasonable basis to determine if Ms. Brockman was at the residence (they had confirmed that the residence was her boyfriend's and that she had been there earlier).

... The Court finds that a reasonable person in these Officers' situation would similarly believe that there was a need for assistance.

3) The Officers were dispatched to a specific location and the defendant had confirmed pieces of information that Officers had received from dispatch which the Court finds led these Officers to have a reasonable basis to associate the need for assistance with the defendant's home.

Given the aforementioned reasoning, the defendant's motion to suppress and dismiss is therefore denied.

CP 16-17

Mr. Moore was convicted as charged after a stipulated trial, and this timely appeal followed. CP 19-26, 12-18.

ARGUMENT

I. THE OFFICERS VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION BY INVADING CHRISTOPHER MOORE'S HOME WITHOUT AUTHORITY OF LAW.

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. Because citizens are entitled to the greatest privacy in their own homes, Article I, Section 7 applies with the greatest force when officers intrude into a dwelling. *State v. Ferrier*, 136 Wash.2d 103, 960 P.2d 927 (1998).

The best source of "authority of law" is a warrant. *Ferrier*, 136 Wash.2d at 115-19, 960 P.2d 927. Searches conducted without a warrant are presumed to be unconstitutional. *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000).

"However, there are a few 'jealously and carefully drawn exceptions' to the warrant requirement." *State v. Reichenbach*, 153 Wash.2d 126, 131, 101 P.3d 80 (2004). The burden is always on the State to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the State asserts an exception, it must produce the facts necessary to

support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The burden of establishing that an exception applies is a heavy one. *Id* at n.11. The validity of a warrantless search is reviewed *de novo*. *Kypreos*, 616 (2002).

EMERGENCY AID EXCEPTION

The emergency aid exception to the warrant requirement emerges from the police's "community caretaking" function and "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance. *State v. Thompson*, 151 Wash.2d 793, 802, 92 P.3d 228 (2004). To justify this exception, the government must show that "(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 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; and (6) the claimed emergency is not a mere pretext for an evidentiary

search.” *State v. Schultz*, 170 Wash.2d 746, 754, 248 P.3d 484 (2011).

THE DOMESTIC VIOLENCE CONTEXT

The Court recognizes that domestic violence presents unique challenges for law enforcement. *Id.* The Court of Appeals has recognized that “[p]olice officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants.” *Id.* (quoting *State v. Raines*, 55 Wash.App. 459, 465, 778 P.2d 538 (1989)).

That police are responding to a situation that likely involves domestic violence may be an important factor in evaluating both the subjective belief of the officer that someone likely needs assistance and in assessing the reasonableness of the officer’s belief that there is an imminent threat of injury. *Id.* Domestic violence protection must also be consistent with the protection the state constitution has secured for the sanctity and privacy of the home. *Id.*, WASH. CONST. art I, sec. 7.

The Washington State Supreme Court specifically addressed the emergency aid exception to the warrant requirement in the context of domestic violence in *State v. Schultz*, 170 Wash.2d 746, 248 P.3d 484 (2011). In *Schultz*, police responded to

a phone call from a neighbor who reported a yelling man and woman. Responding officers heard a man and a woman talking loudly when they arrived at the apartment. The officers knocked on the door and Schultz opened it, appearing agitated and flustered. The officers then entered the apartment based on her acquiescence only. *Id.*

The Court in *Schultz* found that at the moment the officers crossed the threshold to Schultz's apartment they did not have enough facts to justify an entry based upon the emergency aid exception to the warrant requirement. *Id.* at 491. The court found that some of the information the officers relied upon to justify entry was obtained *after* the officers crossed the threshold to Schultz's residence. *Id.* Officers didn't notice that Schultz's neck was red and blotchy until after they entered the apartment so it was not to be considered in the analysis. *Id.* The Court also noted that additional factors may have justified entry such as "past police responses, reports of threats, or any other specific information to support a reasonable belief that domestic violence had occurred or was likely to occur, or that the circumstances were volatile and could likely escalate into domestic violence." *Id.*

The Court of Appeals has also addressed the emergency aid exception to the warrant requirement in the context of domestic violence. See, e.g. *State v. Johnson* 104, Wash.App. 409, 16 P.3d 680 (2001) (emergency aid exception justified a warrantless entry after a report that a victim of domestic violence had locked herself in a bathroom, the defendant had a cut on his wrist and was slow to answer questions about location of the victim); *State v. Menz*, 75 Wash.App. 351, 880 P.2d 48 (1994) (warrantless entry was justified after police received a phone call reporting domestic violence in progress; upon arrival officers observed that the door was ajar, the lights and television were on, and no one responded to knocks or announcements); *State v. Raines*, 55 Wash.App. 459, 778 P.2d 538 (1989) (warrantless entry justified when officers had a history of domestic violence calls, were familiar with the defendant's violent tendencies, and were familiar with victims history of understating events); *State v. Lynd*, 54 Wash.App. 18, 771 P.2d 770 (1989) (warrantless entry was justified when a person called 911 and hung up, return calls met a busy signal, defendant admitted outside his home to assaulting the victim, the defendant was packing a car as if preparing to leave, and the defendant did not want the officer to look in the house).

ACQUIESCENCE AS WAIVER

Individuals do not waive their constitutional right to be free from warrantless searches of their home by failing to object when police enter their homes. *Schultz*, 170 Wash.2d at 756-757. The right not to be disturbed in one's home by the police without authority of law is the bedrock principle upon which our search and seizure jurisprudence is grounded. *Id.*; WASH. CONST. art. I, sec. 7. It can only be waived by informed and meaningful consent. *Id.* (citing *Ferrier*, 136 Wash.2d at 112, 960 P.2d 927).

When police officers conduct a "knock and talk" procedure to obtain consent to search a home, they must, prior to entry, inform the person of the right to refuse or revoke consent. *Id.* (citing *Ferrier*, 136 Wash.2d at 112, 960 P.2d 927).

APPLICATION

In this case, Officers Vermeulen and Xiong searched Mr. Moore's home without a warrant. The State argues the basis for this search is the community caretaking function. Justification for a warrantless search under the community caretaking function requires meeting six criteria: (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 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; and (6) the claimed emergency is not a mere pretext for an evidentiary search. If even one of these criteria is not met, the warrantless entry is deemed illegal.

The first hurdle the State must clear is demonstrating Officers Vermeulen and Xiong subjectively believed Ms. Brockman likely needed assistance for health or safety concerns. They have failed to so, and one need look no further than the controlling case to see why.

In Schultz, the Court found the officers acted unreasonably when they entered a home without a warrant in a domestic violence context. In that case, the court summarized the evidence as follows: (1) a report of a couple yelling; (2) the officers heard “raised voices” and a man say he wanted to be left alone and needed his space; (3) when Schultz answered the door she appeared agitated; and (4) she reported that no one was there before a man appeared

from the bathroom. *State v. Schultz*, 170 Wash.2d 746, 761-62, 248 P.3d 484 (2011).

In this case, the evidence, in summary, is as follows: (1) an anonymous (unverified as to veracity) report of a physical domestic violence incident; (2) the officers heard no raised voices outside the house; (3) Mr. Moore answered the door and showed no signs of distress; (4) everything in the home appeared to be in order and there were children watching television who appeared in good spirits; (5) Mr. Moore answered all questions consistently with what officers observed; and (6) there was no history of domestic violence of any kind associated with Mr. Moore individually or Mr. Moore and Ms. Brockman together. That is it. No other facts were obtained until *after* the officers crossed the threshold into the house (and, it should be noted, those facts, if known at the time the officers entered the house, would still not have provided the requisite authority for Officers Vermeulen and Xiong). Pursuant to *Schultz*, that is where the inquiry ends. *Id.*

It should be noted, though, that Mr. Moore's acquiescence to the officers entering the home does not relieve them of their duty to inform him he has the ability to refuse or revoke consent pursuant to *Ferrier*, and it does not excuse their actions. The purpose of

entering the house was to search it for Ms. Brockman. Without informing Mr. Moore of his rights, no exception to the warrant requirement applies.

In this case, Officer Vermeulen and Officer Xiong entered Mr. Moore's home without a warrant, without a reasonable belief that a specific person needed immediate help, and in the absence of an imminent threat of substantial injury. The officers should have done several things before going through Mr. Moore's home: (1) taken the time to investigate further; (2) gotten in touch with the reporting party to verify his information; (3) gotten in touch with the alleged victim to ascertain her safety; and (4) relied on the information that was directly in front of them as they approached and then made contact with Mr. Moore.

Under the circumstances, the officers' entry violated Mr. Moore's constitutional right to privacy under Article I, Section 7. Accordingly, this Court must suppress the evidence unconstitutionally obtained through the officers' unlawful entry. *Schultz, supra*. Mr. Moore's conviction must be reversed and the case dismissed. *Schultz, supra*.

CONCLUSION

Officer Vermeulen and Officer Xiong violated Article I, Section 7 when they entered Mr. Moore's house without a warrant to investigate a report of domestic violence. For this reason, the evidence obtained in this case must be suppressed and the case dismissed with prejudice.

Respectfully submitted on September 25, 2012.

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