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No. 65545-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ANTHONY BAKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Police officers responded to a 911 call reporting that someone was using a pickup truck to ram a Sport Utility Vehicle (SUV) in the driveway of a house in Tulalip. When officers arrived, they observed an SUV with extensive damage and a pickup truck nearby. A neighbor told them that Brandon Baker, who co-owned the house with his wife Christine, had caused the damage and that the couple were going through a divorce. The officers arrested Mr. Baker outside the house in the front yard. They then searched the house without a warrant in order to "secure the scene," even though they knew that Ms. Baker was not at home and they had no specific information suggesting that anyone else was in the house.

Police officers may not enter a person's residence and search without a warrant incident to the person's arrest, if the arrest occurs outside the home, and the officers are aware of no specific facts indicating that another person is inside the home who needs immediate assistance, or that a danger exists in the home requiring immediate police action. Because Mr. Baker was arrested outside the home, and the officers were aware of no specific facts indicating the presence of another person or an imminent danger in the home, the warrantless search was unlawful.

B. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence, the trial court erred in finding:

There was a slamming of the door, but it was unclear to the officers when they approached the home, that in fact it was the defendant who was in the home. At the time the decision was made to enter the home, they did not know that Brandon Baker was the one who went into the home through the back door.

CP 8.<sup>1</sup>

2. In the absence of substantial evidence, the trial court erred in finding:

[Officer Groom and Officer Fryberg] entered the home to secure the scene, because aide was coming. They entered the home to make sure no one else was in the home, they were unsure whether or not anyone was in the home, and to find out if there was anyone in the home, either or [sic] as a perpetrator, a co-perpetrator, or a victim. That was the purpose of Officer Freyberg's and Officer Groom's entry in the Baker's [sic] home.

CP 9.

3. The court erred in concluding:

The Court finds that in this particular case, given the nature of the call, which is the extensive damage to the SUV, the mental state of the defendant, and the mental state of whomever, if anyone else was doing this, justifies the officers' concern when they enter the house and made sure the scene was secured before they called in the aide

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<sup>1</sup> A copy of the trial court's written findings of fact and conclusions of law following the suppression hearing is attached as an appendix.

crew.

CP 10.

43. The court erred in concluding:

The Court thinks it was reasonable for the officers to enter the house without a search warrant because in this situation, a dissolution, bad things could happen to both persons and property. Obviously, one person was upset enough to cause this damage. The Court did not know until it heard the testimony and got the entire picture of what had taken place on the morning of April 25, 2009. The court does not think the officers knew until they had done their check that there really was no one else involved in this either as a perpetrator or victim.

CP 10.

5. The court erred in concluding the officers' entry into the house without a search warrant was reasonable under either the Fourth Amendment or article 1, section 7 of the Washington Constitution.

6. The court erred in admitting the evidence obtained as a result of the warrantless entry into the house.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the "search incident to arrest" exception to the warrant requirement, police may conduct a limited protective sweep of a person's residence incident to the person's arrest, but only if

the arrest actually occurs *inside* the home. Did the exception apply where the arrest occurred outside and not inside the home?

2. Under the "community caretaking" exception to the warrant requirement, police may enter a residence without a warrant if they subjectively believe someone inside likely needs assistance for health or safety concerns; a reasonable person in the same situation would similarly believe there was a need for assistance; and there was a reasonable basis to associate the need for assistance with the place being searched. Did the exception apply where the officers had no specific information indicating there was anyone in the house who needed assistance?

3. Under the "exigent circumstances" exception to the warrant requirement, police may enter a residence without a warrant if the delay inherent in securing a warrant would compromise officer safety, facilitate a suspect's escape, or permit the destruction of evidence. Did the exigent circumstances exception apply where officers had no specific reason to believe that anyone was in the house, or that any imminent danger existed in the house, at the time of the search?

#### D. STATEMENT OF THE CASE

Brandon Baker was charged in Snohomish County with one count of first degree malicious mischief, RCW 9A.48.070(1)(a).<sup>2</sup> CP 71-72. The State alleged that sometime between April 23 and 25, 2009, Mr. Baker knowingly and maliciously caused physical damage in excess of \$1,500 to his wife's SUV and to property inside the couple's house. CP 71, 94-96.

Before trial, a CrR 3.6 hearing was held to determine whether evidence of the physical damage inside the house, which was discovered during a warrantless search by police, should be suppressed.

Tulalip Police Officer Larry Groom testified that on the morning of April 25, 2009, he was dispatched to the Bakers' home in Tulalip. 4/02/10RP 6. He was told by dispatch that someone was using a pickup truck to ram a car in the driveway. 4/02/10RP 6. When he arrived he saw a pickup truck sitting sideways in the driveway and an SUV nearby that had extensive damage. 4/02/10RP 6. There were skid marks in the driveway and it looked as though the truck had pushed the SUV more than a couple feet. 4/02/10RP 66. The yard was littered with debris. 4/02/10RP 67.

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<sup>2</sup> Mr. Baker was also charged with one count of second degree assault, but the jury acquitted him of that charge. CP 37, 70-71.

As Officer Groom exited his patrol car, he saw two men walking toward him in the driveway and asked them to come over to his car so that he could talk to them. 4/02/10RP 11. One of the men, Peter Yarema, walked over to the officer and identified himself as a neighbor. 4/02/10RP 11. The other man, Mr. Baker, turned around and ran toward the back of the house. 4/02/10RP 12. Officer Groom put handcuffs on Mr. Yarema and placed him in the back of the patrol car until he could sort out the situation. 4/02/10RP 12.

At that point, Officer Ross Fryberg and Sergeant Jeff Jira arrived. 4/02/10RP 13. Officer Fryberg had responded to the same address the day before to do a "welfare check" on Mr. Baker. 4/02/10RP 39. Christine Baker had called police because she was worried about her husband; she had gone to the house and noticed some blood on the floor. 4/02/10RP 41. She told police the couple were going through a divorce and she had moved out of the house. 4/02/10RP 57. Officer Fryberg went to the house that day and spoke to Mr. Baker but determined he was not actually in need of assistance. 4/02/10RP 64. Officer Fryberg communicated this information by radio to Sergeant Jira en route to the house the next day. 4/02/10RP 64, 92.

When Officer Fryberg and Sergeant Jira arrived at the scene, the officers decided to walk to the back of the house to look for Mr. Baker. 4/02/10RP 14. As Officer Groom approached the side of the house, he heard a door slam and told the other officers he thought the suspect was now in the house. 4/02/10RP 14. The officers walked back to their patrol cars. 4/02/10RP 15.

Sergeant Jira asked dispatch to run the license plate on the SUV and found it was registered to Christine Baker. 4/02/10RP 68. He then questioned Mr. Yarema, who was still sitting in Officer Groom's car. 4/02/10RP 18, 69. Mr. Yarema said he had seen Mr. Baker ramming his pickup into his wife's car and had come over to try to calm him down. 4/02/10RP 18-19, 69. He confirmed the couple were going through a divorce. 4/02/10RP 69. He said Mr. Baker did not have any weapons in the house. 4/02/10RP 70, 86.

Sergeant Jira radioed for backup from county deputies. 4/02/10RP 15, 71. Then suddenly the officers heard a motor start up in the garage. 4/02/10RP 15, 44, 71. Sergeant Jira told the other officers to get out their tasers. 4/02/10RP 15. As the officers drew their tasers and walked toward the garage they saw the garage door open. 4/02/10RP 16, 45, 72. Mr. Baker then came out of the garage riding an ATV at high speed and headed toward the

officers. 4/02/10RP 19, 47, 73-74. Officer Fryberg deployed his taser and Mr. Baker fell to the ground. 4/02/10RP 20, 45, 74-75. He was arrested and handcuffed in the front yard. 4/02/10RP 20, 49.

Sergeant Jira asked Officer Groom to get his camera and take pictures of the vehicles in the driveway and of Mr. Baker and the taser probes. 4/02/10RP 20, 75-76. The officers stood outside with Mr. Baker for a period of time, asking if he needed aid, reading him his rights, and taking pictures of the driveway and of the taser probes and marks on Mr. Baker. 4/02/10RP 35-36, 49-50. Aid units were dispatched and Sergeant Jira decided they needed to "secure the scene" before the aid units arrived. 4/02/10RP 22, 50, 78-80. Jira noticed the front door to the house was open and felt that presented a possible danger. 4/02/10RP 67, 78-80. But Sergeant Jira testified he "[knew] of no other people in the house." 4/02/10RP 71, 78-79.

Sergeant Jira told Officers Groom and Fryberg to make a "safety sweep" of the house in order to secure the scene. 4/02/10RP 20-21, 80. The officers had no information about any possible injured person inside; there was no indication that anyone had been assaulted. 4/02/10RP 58-60, 86. The officers spoke to

neighbors who had gathered at the scene, but no one said anyone else was in the house or was injured. 4/02/10RP 85. But although the officers had no specific reason to believe anyone was in the house, they decided to search "just to make sure that there wasn't anybody" inside who was injured or was a possible suspect. 4/02/10RP 21-22, 26, 53. One of the purposes of the search was also to gather evidence. 4/02/10RP 54.

Officers Groom and Fryberg entered the house through the front door and looked in each room. 4/02/10RP 23. As they walked in, they saw footprints on the front door and the door casing broken. 4/02/10RP 24. Inside the house, they saw extensive damage. 4/02/10RP 24-26, 51-52. Two television sets were destroyed and a chandelier was pulled out of the ceiling. 4/02/10RP 24; 4/12/10RP 54-66, 79-82, 92-93. There were holes in the walls and the kitchen cabinets; the refrigerator door was removed and food was strewn on the floor; a broken lamp was on the floor; and pictures and picture frames were damaged. Id. Things were thrown everywhere and furniture was flipped upside down. 4/02/10RP 51-52. After the initial sweep, the officers took photographs of the damage inside the house. 4/02/10RP 27, 54. The officers found no one inside. CP 10.

Medics tended to Mr. Baker, who did not need to go to the hospital. 4/02/10RP 83. He was arrested and taken to the police station. 4/02/10RP 84.

The trial court found the warrantless search of the house was justified out of concern for the safety of the officers and others present in the area. CP 7-10. The court found that "given the nature of the call, which is the extensive damage to the SUV, the mental state of the defendant, and the mental state of whomever, if anyone else was doing this, justifies the officers' concern when they enter the house and made sure the scene was secure before they called in the aide crew." CP 10. The court concluded "it was reasonable for the officers to enter the house without a search warrant because in this situation, a dissolution, bad things could happen to both persons and property." CP 10.

At trial, the photographs the officers took of the damage inside the house were admitted. 4/12/10RP 54-66. Christine Baker testified as to how much it cost her to replace the damaged items. 4/13/10RP 2-10.

In closing argument, the State emphasized the extensive damage to the items in the home, arguing it showed Mr. Baker

acted with malice and that his actions were directed toward his wife. 4/14/10RP 50-51.

The jury found Mr. Baker guilty of first degree malicious mischief as charged. CP 36.

#### E. ARGUMENT

THE WARRANTLESS SEARCH OF THE HOME WAS UNLAWFUL, WHERE THE ARREST OCCURRED OUTSIDE THE HOME AND THE OFFICERS HAD NO SPECIFIC REASON TO BELIEVE ANYONE WAS IN THE HOME WHO NEEDED IMMEDIATE ASSISTANCE OR WAS A POSSIBLE SUSPECT

1. Warrantless police searches of a person's home are presumptively unreasonable. The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnotes omitted); U.S. Const. amend. 4 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."). Exceptions to the warrant requirement are "jealously

and carefully drawn." Florida v. White, 526 U.S. 559, 568, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999).

The Fourth Amendment draws a firm line at the entrance of the house and "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (quoting Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). For purposes of article 1, section 7 of the Washington Constitution, a warrant provides police the authority of law necessary to enter a person's home. Holeman, 103 Wn.2d at 429; Const. art. 1, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

All warrantless entries of a home are presumptively unreasonable. Payton, 445 U.S. at 587; State v. Hinshaw, 149 Wn. App. 747, 753, 205 P.3d 178 (2009). "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970). Courts scrupulously protect a citizen's right to privacy in his or her home, because "[i]n no area is a citizen more entitled to his privacy than in his or her home." State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). "For this

reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Id. (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

The State bears the heavy burden of proving that the warrantless search fits within an established exception to the warrant requirement. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Police may not use an exception as a pretext for an evidentiary search. Id.

This Court reviews a trial court's challenged findings following a suppression hearing for substantial evidence, which is "a sufficient quantity of evidence . . . to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The trial court's conclusions of law are reviewed de novo. Smith, 165 Wn.2d at 516.

2. The warrantless search does not fall under the search incident to arrest exception to the warrant requirement, because the arrest occurred outside the home. Police may, incident to a lawful arrest occurring inside a person's home, conduct a warrantless protective sweep of the home that "is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 108

L.Ed.2d 276 (1990). The allowable scope of the search is limited to "closets and other spaces immediately adjoining the place of arrest from which an attack could reasonably be launched." Id. at 334. Beyond that, police must have "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id.

But the search incident to arrest exception applies only if the arrest occurs *inside* the home. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); Shipley v. California, 395 U.S. 818, 89 S.Ct. 2053, 23 L.Ed.2d 732 (1969) (per curiam). The United States Supreme Court "has consistently held that a search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'" Shipley, 395 U.S. at 819 (quoting Stoner v. California, 376 U.S. 483, 486, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)) (emphasis in Shipley). Thus, "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps." Vale,

399 U.S. at 33-34 (citations omitted). In Vale, the Court held police could not search a house incident to arrest where the arrest occurred on the front steps of the house. Id. at 32-33. In Shipley, the search of the home was similarly invalid, where the arrest occurred next to the defendant's car parked outside the house and 15 or 20 feet away from it. Shipley, 395 U.S. at 819.

Here, as in Vale and Shipley, the warrantless search of the house was not justified by the search incident to arrest exception, because the arrest occurred *outside* the house. Police arrested Mr. Baker as he lay on the ground in the front yard after being tased by Officer Fryberg. 4/02/10RP 20, 49. Therefore, police were not permitted to enter the house incident to Mr. Baker's arrest.

3. The warrantless search does not fall under the "community caretaking" exception to the warrant requirement, because officers had no specific reason to believe there was anyone inside the house who needed immediate assistance. The "community caretaking" exception, which is divorced from the criminal investigation, is another exception to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for

police officers to render aid or assistance or when making routine checks on health and safety. Id. Thus, under some circumstances, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." Michigan v. Fisher, \_\_\_ U.S. \_\_\_, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009) (quoting Mincey v. Arizona, 437 U.S. 385, 393-94, 98 S.Ct. 2408, 57 L.Ed. 290 (1978)).

The "community caretaking" exception applies only if (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; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. Thompson, 151 Wn.2d at 802. "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" Id. (quoting Kalmas v. Wagner, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)).

When officers invade a dwelling without a warrant under the emergency doctrine, they must be able to articulate specific facts

and reasonable inferences drawn therefrom that justify the warrantless entry. State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997) (citing State v. Sanders, 8 Wn. App. 306, 310, 506 P.2d 892 (1973) (citing Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968))).

a. The community caretaking exception applies only if officers have specific information indicating someone inside the residence is in need of immediate aid. In order for the exception to apply, officers must have ""an objectively reasonable basis for believing," that 'a person within [the house] is in need of *immediate aid.*"" Fisher, 130 S.Ct. at 548 (quoting Mincey, 437 U.S. at 392) (quoting Brigham City v. Stuart, 547 U.S. 398, 406, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006))) (emphasis added); Thompson, 151 Wn.2d at 803. One such exigency is the need to assist persons who are seriously injured or threatened with such injury. Fisher, 130 S.Ct. at 548 (citing Stuart, 547 U.S. at 403). "Thus, law enforcement officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" Fisher, 130 S.Ct. at 548 (quoting Stuart, 547 U.S. at 403).

In Fisher, for instance, police officers responded to a complaint of a disturbance and found a truck in the driveway with its front smashed, damaged fenceposts, and three broken house windows. Fisher, 130 S.Ct. at 547. They also noticed blood on the hood of the pickup and on clothes inside of it as well as on one of the doors to the house. Id. Through a window they could see Fisher screaming and throwing things. Id. When Fisher refused to answer the officers' knock, they pushed their way into the house. Id. The Supreme Court held that because the officers saw Fisher screaming and throwing things, "[i]t would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage." Id. at 549.

Similarly, in State v. Hos, 154 Wn. App. 238, 242, 225 P.3d 389, rev. denied, 169 Wn.2d 1008 (2010), when an officer knocked on the front door of Hos's residence and received no response, he looked through a window and saw her sitting on a couch with her eyes closed and her head resting on her chest. The officer could not tell if she was breathing; she seemed to be either unconscious or dead. Id. Because the officer had a subjective and reasonable basis to believe Hos was in need of immediate medical attention,

and because he did not enter the house as a pretext to gather evidence, the warrantless entry was justified. Id. at 247-48; see also Davis, 86 Wn. App. at 420 (warrantless entry justified when, after check-out time, motel occupant did not respond to repeated telephone calls and knocks on door); State v. Gocken, 71 Wn. App. 267, 277, 957 P.2d 1074 (1993) (inability to contact victim for several weeks coupled with victim's advanced age and mental and physical infirmities justified warrantless entry); State v. Lynd, 54 Wn. App. 18, 23, 771 P.2d 770 (1989) (after receiving hang-up 911 call, "[the officer] would have been derelict in her duty as a police officer in not entering the residence to check on [a known victim of domestic violence]").

But when officers have no specific reason to conclude someone in the house needs immediate assistance, they may not enter the home without a warrant. Thompson, 151 Wn.2d at 803 (officer's entry to retrieve suspect's jacket unjustified where officer had no reason to believe jacket contained weapon and no reason to believe anyone else was in the home); State v. Schlieker, 115 Wn. App. 264, 271-72, 62 P.3d 520 (2003) (warrantless entry into trailer unjustified, even though police had received a report of a gunshot on the property and the trailer door was open, because

deputies had no information indicating anyone inside the trailer was injured); State v. Swenson, 59 Wn. App. 586, 590, 799 P.2d 1188 (1990) (warrantless entry unjustified where neighbor reported front door to defendant's home was left open but officers had no reason to suspect anyone was inside the residence).

Thus, officers must have a specific reason to believe someone inside the home needs immediate help. They may not enter a home without a warrant based only on a generalized fear of danger to the community. State v. Lawson, 135 Wn. App. 430, 437-48, 144 P.3d 377 (2006) (warrantless entry unjustified where officers smelled strong chemical odor coming from inside shed but had no information that anyone on the property or in the shed was injured or in need of immediate help).

b. The community caretaking exception did not apply in this case, because officers had no specific information indicating that anyone was inside the house who needed immediate aid. The officers' warrantless entry into Mr. Baker's home was unjustified, because the officers had no specific reason to believe anyone inside the house needed immediate aid, or indeed that anyone was inside the house at all. Sergeant Jira acknowledged he "[knew] of no other people in the house." 4/02/10RP 71, 78-79. The trial

court specifically found the officers knew that Ms. Baker was not in the home at the time of the search. CP 5. None of the witnesses on the scene indicated that anyone else was in the house or was injured. 4/02/10RP 85. None of the officers testified they had any specific information indicating someone was inside who needed immediate aid. Instead, they decided to search "just to make sure there wasn't anybody" inside. 4/02/10RP 21-22, 26, 53. But there must be "more than a mere possibility of an [emergency]" to justify the warrantless search of a home. United States v. Meixner, 128 F.Supp.2d 1070, 1073 (E.D. Mich. 2001). Officers must be able to point to specific and articulable facts justifying a reasonable belief that someone inside needs immediate assistance. Id. at 1075.

Here, the trial court found that "[a]t the time the decision was made to enter the home, [the officers] did not know that Brandon Baker was the one who went into the home through the back door" and slammed the door. CP 8. But that finding is contradicted by the officers' testimonies. Again, all three officers testified they had no information that anyone else was in the house. 4/02/10RP 21-22, 26, 53, 58-60, 71, 78-79, 85-86. Officer Groom testified that, when he heard the door slam, he believed that was Mr. Baker

entering the house. 4/02/10RP 14. He so informed the other officers. Id. None of the officers contradicted that testimony.

The officers testified, and the trial court found, they entered the house "just to make sure that there wasn't anybody" inside who was injured or was a possible suspect. 4/02/10RP 21-22, 26, 53; CP 9. But the officers' actions were inconsistent with the belief that someone inside was in need of *immediate* assistance, as required by the community caretaking exception. The officers delayed for several minutes after Mr. Baker was tased before they entered the house. After subduing Mr. Baker, they stood outside congratulating each other, reading Mr. Baker his rights, and taking photographs of the damage in the driveway and of the taser probes and marks on Mr. Baker. 4/02/10RP 35-36, 49-50. Only then did they enter the house. But if officers arrive at the scene and delay entering the house, this suggests they do not believe or have reasonable cause to believe that someone in the house needs immediate attention. Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971) (officer's decision not to enter house immediately upon arrival "is not consistent with that of a man who believes that wounded persons might be lying inside the house awaiting attention"). Therefore, the officers' actions and testimonies contradict the court's finding that

they actually believed someone was in the house who needed immediate aid.

Sergeant Jira testified he thought the open front door presented a danger, but that is not enough to justify a warrantless entry into the house. 4/02/10RP 67, 78-80; CP 7. A warrantless entry into a house is unjustified even if the front door has been left open, if officers have no reason to believe anyone is inside who needs assistance. Schlieker, 115 Wn. App. at 271-72; Swenson, 59 Wn. App. at 590.

The trial court found significant that the Bakers were going through a divorce, that Mr. Baker was "unstable and in a rage," and that he had damaged his wife's SUV. CP 7-8. But domestic violence situations are not *per se* emergencies justifying a warrantless entry into a home. United States v. Najjar, 451 F.3d 710, 719 (10th Cir. 2006). "[T]here is no domestic violence abuse exception to the Fourth Amendment, generally." United States v. Black, 466 F.3d 1143, 1147 (9th Cir. 2006).

Washington courts recognize that domestic violence cases can present a unique set of dangers that may, at times, override considerations of privacy. But at the same time, there is no domestic abuse exception to the Fourth Amendment or article 1,

section 7, or to the limitations on the community caretaking exception to the warrant requirement. Officers must still be aware of specific facts indicating someone inside the home needs immediate assistance. In domestic violence cases where courts have upheld a finding of emergency, police were presented with clear evidence of an assault and had reason to believe the victim was still inside the house and in potential danger. See State v. Johnson, 104 Wn. App. 409, 418-19, 16 P.3d 680 (2001) (police responded to call of domestic violence assault and found victim inside house with bloody lip); State v. Raines, 55 Wn. App. 459, 464, 778 P.2d 538 (1989) (police responded to call of domestic violence assault where neighbor overheard woman pleading with Raines not to hit her 7-year-old son; "In these circumstances, the officers had a duty to ensure that the child was safe and that conditions in the apartment had returned to a state of normalcy" and that Raines no longer posed a threat to them); State v. Lynd, 54 Wn. App. at 22-23 (police responded to hang-up telephone call at Lynd's home; when they arrived Lynd admitted pushing his wife to the floor and slapping her; it was reasonable for officers to fear the wife remained inside, injured, and to enter the home without a warrant to check on her).

This case presents a strong contrast to the domestic violence cases above, where courts have approved warrantless entries. Here, there was no evidence of assault. The officers had no indication that anyone was injured in the incident other than Mr. Baker himself. Although Mr. Baker was apparently angry at his wife, there was no evidence that he assaulted her or that she was injured. In fact, the day before, she had called police because she was worried about her husband's welfare, not her own. 4/02/10RP 41. In addition, the trial court specifically found the officers knew that Ms. Baker was not in the home when they entered the house without a warrant. CP 5.

In sum, at the time the officers entered the house, they had no specific information that anyone inside needed immediate assistance. In fact, by delaying entry, the officers' actions were inconsistent with the belief that someone inside needed immediate aid. Instead, the record shows the officers entered the house based only on the mere possibility that someone inside might need their help. Because the officers did not have an objectively reasonable basis to conclude someone inside the house was in need of immediate assistance, the warrantless entry does not fall

under the community caretaking exception to the warrant requirement. See Fisher, 130 S.Ct. at 548.

4. The warrantless search does not fall under the "exigent circumstances" exception to the warrant requirement, because police had no specific information that a suspect or any other danger was present in the house. "Exigent circumstances" is another recognized exception to the warrant requirement. Smith, 165 Wn.2d at 517. "'Exigent circumstances' involve a true emergency, i.e., 'an immediate major crisis,' requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence." Hinshaw, 149 Wn. App. at 753 (quoting Dorman, 435 F.2d at 319); Michigan v. Tyler, 436 U.S. 499, 509-10, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). The rationale behind the exigent circumstances exception is to permit a warrantless search where there is compelling need for official action and no time to secure a warrant. Tyler, 436 U.S. at 509; Smith, 165 Wn.2d at 517.

The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action. Hinshaw, 149 Wn. App. at 754. They must show why it was impractical, or unsafe, to take the time to get a warrant. Id. "'When an officer

undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant." Id. (quoting McDonald v. United States, 335 U.S. 451, 460, 69 S.Ct. 191, 93 L.Ed. 153 (1948)).

In determining whether exigent circumstances existed, the court looks at the totality of the situation in which the circumstances arose. Smith, 165 Wn.2d at 518. The court considers: (1) the gravity or violent nature of the offense; (2) whether the suspect was reasonably believed to be armed; (3) whether police had reasonably trustworthy information that the suspect was guilty; (4) whether there was strong reason to believe the suspect was on the premises; (5) a likelihood that the suspect would escape if not swiftly apprehended; and (6) whether the entry could be made peaceably. Id. Not all factors must be met in order to find exigent circumstances, but the circumstances must show the officer needed to act quickly. State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127 (2002). "The totality of circumstances said to justify a warrantless securing or search of a house under the doctrine of exigent circumstances will be closely scrutinized." State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978).

Here, the trial court found the officers' warrantless entry into the home was justified in order to "find out if there was anyone in the home," either "a perpetrator, [or] a co-perpetrator." CP 9-10. But the officers had no specific information suggesting the presence of a possible second suspect in the house. In fact, all of the information available to the officers indicated that only one person—Mr. Baker—was involved in the incident. A 911 caller reported that only one person was using a pickup truck to ram a car in the driveway of the Bakers' home. 4/02/10RP 6. The neighbor, Mr. Yarema, told police he observed only Mr. Baker ramming his pickup truck into his wife's car. 4/02/10RP 18-19, 69. None of the other neighbors present at the scene told police that anyone else was involved or present in the house. 4/02/10RP 85. The officers were aware that the Bakers were going through a divorce, that Mr. Baker was angry and upset, and that he had caused damage to an SUV registered in his wife's name. 4/02/10RP 41, 57, 64, 68-69, 92. Thus, the officers knew only that the conflict concerned Mr. Baker and his wife. There was no information suggesting that anyone else was involved in the dispute. The officers did not have probable cause to believe any other suspect was involved in the

crime. They were certainly not justified in entering the house without a warrant in order to look for a possible second suspect.

Also, the nature of the crime precludes a finding of exigent circumstances. Mr. Baker was convicted of one count of first degree malicious mischief. CP 71-72. The Sentencing Reform Act defines first degree malicious mischief as a "nonviolent offense." RCW 9.94A.030(32), (53). No one, except Mr. Baker, was injured during the incident. At the time of the search, Mr. Baker was handcuffed and subdued and presented no danger to police or the community. There were no weapons in the house. 4/02/10RP 70, 86. Police had no specific information indicating that any person or possible danger existed in the house that required immediate police action.

In Smith, police officers knew a firearm was inside the house, a stolen tanker truck parked next to the house was pressure-filled with 1,000 gallons of anhydrous ammonia, and a possible third person was present inside the house who could either shoot at the officers or at the pressurized tank. Smith, 165 Wn.2d at 519. Under those "unusual facts, . . . most notably the combination of large quantities of a toxic chemical and the missing firearm," police were justified in searching the house to look for a

person who might be hiding in the house and to confiscate the missing gun. Id. at 519. Here, unlike in Smith, the officers were aware of no real danger inside the house that required immediate police action.

As stated, the circumstances must show the officers needed to act quickly. Cardenas, 146 Wn.2d at 408. But again, the officers did not *act* as though they believed they needed to act quickly. As discussed above, the officers delayed for several minutes after Mr. Baker was tased before they entered the house. They spent that time congratulating each other, reading Mr. Baker his rights, and taking photographs of the damage in the driveway and of the taser probes and marks on Mr. Baker. 4/02/10RP 35-36, 49-50. These actions are inconsistent with the belief that serious consequences would result if the officers took the time to get a warrant.

In sum, the warrantless search does not fall under the exigent circumstances exception to the warrant requirement, because officers had no reason to believe a second suspect was involved in the crime and inside the house; the crime was not a violent offense and no one was injured (other than Mr. Baker); Mr. Baker was in handcuffs and presented no danger at the time of the search; no weapons were in the house; and no other specific

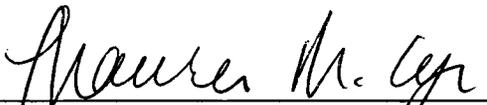
information indicated the presence of any other imminent danger inside the house.

4. The evidence seized during the warrantless search must be suppressed. Where a police search is unlawful in violation of the constitution, the remedy is to suppress the evidence seized as a result of the search. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Afana, 169 Wn.2d 169, 179, 233 P.3d 879 (2010). That is the remedy here.

E. CONCLUSION

The police officers' warrantless entry into Mr. Baker's home violated his state and federal constitutional right to privacy. The evidence seized as a result of that intrusion must be suppressed.

Respectfully submitted this 29th day of November 2010.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

## **APPENDIX**



FILED  
2010 JUL 16 PM 4: 27  
SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
BAKER, BRANDON ANTHONY  
  
Defendant.

No. 09-1-01423-4

CERTIFICATE PURSUANT TO  
CrR 3.6 OF THE CRIMINAL RULES  
FOR SUPPRESSION HEARING

On April 8, 2010, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing, photographic and video evidence and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

**I. FINDINGS OF FACT**

1. On April 25, 2009 at 9:20 a.m. Officer Groom was dispatched to 1413 77<sup>th</sup> St. N.W., Tulalip, Snohomish County, Washington. He was advised by dispatch that someone had called 911 to report that a person was using a black pickup truck to ram another vehicle at the above address.
2. When Officer Groom got to the address, he saw the black pickup truck parked across the driveway and a heavily damaged silver-colored SUV in the driveway.

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3. Officer Groom saw two males walking down the driveway. He called out to them to come and talk to him. One of the males did. The other male ran away towards the rear of the house.
4. Officer Groom, being the only officer at the scene, handcuffed the male who had approached him and cooperated with him. After handcuffing him, he placed the male in the back of his patrol car.
5. Officer Groom assessed the situation he had come upon. He testified that he was unsure of what was going on, why it was going on, or how many people were involved in what was going on.
6. Minutes or even seconds later, Officer Fryberg of the Tulalip Police Department arrived at the scene.
7. Officer Fryberg had been called out to the residence the day before, April 24, 2009, to do a welfare check on Mr. Baker. It was learned that the homeowners, Brandon and Christine Baker, were going through a divorce. Officer Fryberg had contact with Brandon Baker and learned of some concerns and some possible blood somewhere in the home. He was assured that Brandon Baker was not in peril and took no action.
8. Sgt Jira arrived in front of the Baker home shortly after Officer Fryberg arrived on the morning of April 25, 2009. On his way to the scene, Sgt. Jira had been briefed by Officer Fryberg about his contact the day before with Brandon Baker.
9. When Sgt Jira arrived at the scene, Officer Groom briefed him regarding what he had observed at the scene prior to Sgt. Jira's arrival that morning.
10. Sgt. Jira, Officer Fryberg, and Officer Groom approached the Baker's house to see if they could locate the person who had run away from Officer Groom. They saw that the front door was standing open. Officer Groom had informed them that the person had run

towards the back of the house. The Officers got to where they could see the back of the house and saw no one.

11. The back yard of the Baker's house is expansive. It leads away from the house to an area some distance away that the officers did not go to.
12. The officers heard a door slam from inside the residence. This concerned them and they backed out to where the patrol cars were parked on the street in front of the house. They called for the defendant because they believed he was the person who ran and may be the person who is now inside the house. They got no response.
13. The officers learned from various contacts that the owner of the damaged vehicle or at least the person who is supposed to be in possession of the damaged vehicle is the suspect's estranged wife. They also learned that the estranged wife is not in the home and she was the person who had called 911 earlier that morning.
14. As the officers were trying to decide what to do next, they heard the revving of a motor coming from the garage. Officer Fryberg recognized the noise as the motor on an ATV, Banshee. They noticed the garage door on the far right as you are facing the house opening. This is clearly shown on the video.
15. The three officers started to approach the area to the right of the house. They took a cautious approach. The garage door opened up. The motor continued revving and the ATV came out of the garage. The ATV came almost directly at Officer Fryberg. The other officers dispersed immediately. As the ATV went by, Officer Fryberg fired a taser at the person on the ATV. The ATV rider is later identified as Brandon Baker, the defendant. Mr. Baker went into a slide, came off the ATV, and was taken into custody on the front lawn of the house. The officers contained Mr. Baker who was not being overly cooperative. Mr. Baker was probably still under the effects of being tased.

16. Officer Fryberg and Officer Groom are directed by Sgt. Jira to get their cameras and start taking pictures of the scene, the taser implement, and the surrounding area.
17. Sgt Jira then directed the two officers to go check the house. He has been made aware that the aide crew is coming, possibly to administer aide to Mr. Baker. It is apparently a requirement of the EMT's and aid personnel that the area be secured and free of potential threats before emergency medical personnel can enter the area.
18. Sgt Jira testified that he was also concerned that others may be in the house either as participants in the incident or as possible victims, although they know pretty clearly, Brandon Baker's estranged wife, Christine Baker is not in the house.
19. Officer Groom and Officer Fryberg did a check of the residence. You see them enter through the front door on the video. They are gone for a period of time, and then they return. The testimony was that once they made their entry, they went from room to room, checking every place a person could be. They testified they did not open or check into drawers or other areas, but concentrated on going from room to room where a person could be. They also testified that they did not collect evidence or otherwise engage in an investigation while they were checking the interior of the house.
20. Once they checked the house, they reentered the rooms they had previously checked and took pictures of the extensive damage that had been done to the interior of the house, the damage they had seen when they did their security check.

## **II. CONCLUSIONS OF LAW**

The entry into the residence was not done on the basis or the authority of a search warrant. Consequently, all evidence obtained by the entry would be inadmissible unless it was obtained under a recognized exception to the search warrant requirement. The recognized exceptions to the search warrant requirement seem to focus around whether or not the actions

taken without the warrant are reasonable. This is because it is only unreasonable searches or unreasonable activity that is prohibited. Each case must be reviewed on its own facts, its own circumstances, and any conceivable exigencies to determine if the actions taken which lead to the discovery of evidence were reasonable.

Some of the circumstances encountered by the Officers at the scene have already been stated in the Findings of Fact. Some of those circumstances will be readdressed to establish what was going on in the police officers' minds in order to establish what the situation was from their perspective. It is unfair to analyze the circumstances in hindsight after we know things about what was there and what was not there. It is the officers' conduct and the reasonableness of that conduct at the time of the incident that has to be analyzed in this case.

The officers were dispatched to the scene of property damage where someone, maybe even the defendant, was damaging a SUV with a truck. That is clear. When they arrive, there is tremendous damage done to the SUV. The home is standing open. Sgt. Jira commented that it looked like a bomb had gone off in the area. The officers commented that they were concerned about what was going on, who was involved in what had been going on, and the safety of the persons or property therein.

When Officer Groom arrived at the Baker home, he contacted two people. One of whom complied with the officer's request to contact him. The other one did not. The Court does not think the fact that a person ran away from Officer Groom is a positive influence on the officers' concern for their own safety and the safety of others in the area.

To increase the officers' concern, they know that Brandon and Christine Baker are going through a divorce. They know this from both the previous day's contact with Officer Fryberg and from the scene of what had been going on with the driver of the pickup truck and the SUV moments before the officers arrived at the house.

The Court cannot really comment on the mental state of Mr. Baker. If he was the one doing the damage, it certainly seems that there would be a certain indication that this person was unstable and in a rage, for whatever reason.

Again, Sgt. Jira commented that when he observed the scene and was briefed by Officer Groom and Officer Fryberg about the other events they had observed or heard, "His blood went up." The Court interprets this comment to mean that Sgt. Jira's blood pressure went up. That he recognized and perceived the situation as a high-stress situation involving unknown people. He knew that at least one of the people encountered at the Baker's house was not cooperative and managed to avoid contact with the police. He also witnessed the obvious and apparent extensive property damage that had been done to the SUV. Adding to this concern is the open door, the door that could have been used as an access to the home, was an entrance which was not taken by the person who ran away from Officer Groom. Also, the failure of anyone inside, if there was someone inside, to respond to the officers' request to contact them. This caused additional concern about exactly what was going on by whoever was inside the home. There was a slamming of the door, but it was unclear to the officers when they approached the home, that in fact it was the defendant who was in the home. At the time the decision was made to enter the home, they did not know that Brandon Baker was the one who went into the home through the back door. The Court, now in hindsight, can assume that he did.

Then, we have the ATV in the garage. It is noteworthy that when the ATV Banshee actually exited the garage, it did not turn to the left and go away from the offices, rather, the driver turned right and headed directly to where the officers were. The officers indicated and you can actually see it on the video that Mr. Baker came at them, and that they split up, and took cover, and fired at him as he went by.

Mr. Baker's continued lack of cooperation only generates more confusion about what is going on in the house. . Mr. Baker is not being combative. Certainly he has been tased and he is somewhat contained. But, he is not providing any additional information that would help the officers understand what exactly the situation is that they have gotten into.

Then, the testimony is and the circumstances are that Officer Groom and Officer Fryberg entered the home. They entered the home to secure the scene, because aide was coming. They entered the home to make sure no one else was in the home, they were unsure whether or not anyone was in the home, and to find out if there was anyone in the home, either or as a perpetrator, a co-perpetrator, or a victim. That was the purpose of Officer Freyberg's and Officer Groom's entry into the Baker's home.

It is important to the Court that the officers testified that they engaged in conduct that was designed to do just that, to secure the scene and determine whether or not there was anybody else inside or whether or not if Mr. Baker was in the home he could have done some property damage that may be delayed. . The most important thing to the Court is that it was not known to the officers what was going on inside the Baker's home. However, we know that, during the search of the home for persons, no evidence was obtained. Nothing was done except to go in, make sure no one was there.

These are the circumstances and these are the facts that the Court has to analyze to extensive damage to the SUV, the mental state of the defendant, and the mental state of determine whether or not the officers' conduct, meaning the entry into the Baker's home and the reentry into the rooms of the home to gain the photographs, was reasonable.

There are two recognized exceptions. . The community caretaking and the officer and public safety exceptions are exceptions which relieve the officers of the task of waiting to try and get a search warrant because of the exigencies, the emergency, and the necessity of the circumstances they are faced with.

The Court finds that in this particular case, given the nature of the call, which is the extensive damage to the SUV, the mental state of the defendant, and the mental state of whomever, if anyone else was doing this, justifies the officers' concern when they enter the house and made sure the scene was secured before they called in the aide crew.

The last thing anyone would want is for the aide crew to come into the scene and begin treating someone and then have someone in the house jump out at them and continue on with whatever destructive behavior had brought the officers there in the first place.

The Court thinks it was reasonable for the officers to enter the house without a search warrant because in this situation, a dissolution, bad things could happen to both persons and property. Obviously, one person was upset enough to cause this damage. The Court did not know until it heard the testimony and got the entire picture of what had taken place on the morning of April 25, 2009. The court does not think the officers knew until they had done their check that there really was no one else involved in this either as a perpetrator or victim.

So, the Court finds that the officers' initial entry was justified, was reasonable, and could be done without the requirement for a search warrant.

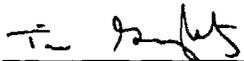
The second entry was to take photographs. The second entry was simply a continuation of the first entry and if the first entry was permissible then, the second entry to document the first entry is admissible. The photos should be allowed to be admitted.

The evidence seen and observed in the first entry and the photographs of the damage taken during the second entry are admissible, even though they were not done without a search warrant. This is because the officers' entry into the house was a reasonable response to the exigencies and circumstances of this particular incident.

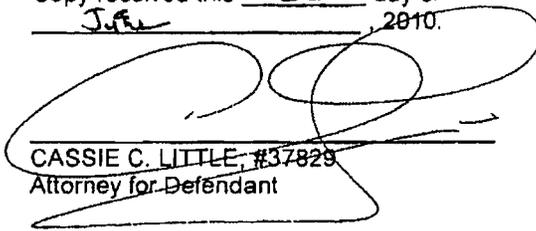
DONE IN OPEN COURT this 22<sup>nd</sup> day of June, 2010.

  
JUDGE

Presented by:

  
TIM P. GERAGHTY, #26278  
Deputy Prosecuting Attorney

Copy received this 22 day of  
June, 2010.

  
CASSIE C. LITTLE, #37829  
Attorney for Defendant

BRANDON ANTHONY BAKER  
Defendant