

NO. 70338-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVE HOVANDER AND

STARLARE HOVANDER

Appellants.

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

The Honorable IRA J. UHRIG, JUDGE

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

Defendants/Appellants Steve and Starlare Hovander respectfully reply to the Brief of Respondent as follows.

A. THE STATE'S FACTS: The state's brief overlooks several undisputed facts, among them:

- The officers arrived at dusk.
- They wandered freely about remote wooded private property on muddy dirt roads and dirt paths for about fifteen minutes, only attempting to contact the targeted residents after they had succeeded in their quest for evidence of marijuana.
- Their path took them to places that were not open to the public, including a wooded dirt path behind the residence. The officers' testimony documenting the breadth of their search is summarized in Appellants' Opening Brief at 8-9.

B. THE STATE'S ARGUMENTS:

State's Argument B. 1. A: the absence of the warrant from the record before the court is the appellants' problem. The state argues that it is the defendant's burden to establish the existence of a warrant. This counsel has found no authority on this novel issue. A rule requiring the defendant to establish the existence of a warrant would make no sense.

The state generates the warrant. Upon establishing that a warrant existed the state is relieved of the burden to establish that a search was legal. Why should the defendant bear the burden to establish an element that would lighten the state's burden?

Here the state chose to assume the burden by putting on its case first. The state had the opportunity to place the warrant and affidavit before the judge and declined to do so. Had they done so, the burden would have shifted to the defendant. What the state chose to put before the judge was constitutionally inadequate. *State v. Myers*, 117 Wn.2d 332, 815 P.2d 761 (1991).

This error is “manifest” and affects a constitutional right—the right to contest a search and have a court decide whether it was constitutional.

State's Argument B.1.b: no proof of trespass. The state does not address appellants' arguments.

The state argues that “Hovanders cannot demonstrate the trial court erred in concluding the officers were not illegally trespassing” To the extent that this argument suggests that the Hovanders have some burden to establish the lack of authority of law for a warrantless intrusion, this is incorrect. The state bears the burden to establish that warrantless entry to search private land is lawful. *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000).

The state argues that the property was not posted at the time of the search. The appellants have conceded that this finding, while contested, is supported by sufficient evidence that the trial court's decision as to witness credibility will not be disturbed on appeal. Our arguments in this appeal are based only on testimony of the officers. Appellants' Opening Brief at 7 n2. The part of the Finding that is at issue is that the officers' route was open to the public and that they acted in a manner of a reasonably respectful visitor. To this point the state argues:

Deputy Taddonio explained the officers did not ever walk around the back or the sides of the cabin and that all of the information gathered during the initial investigation was done while officers were on one of two paths that went in front of and behind the Hovanders' cabin.

State's Brief at 17. Exhibit 7 shows the area the path traversed. The diagram admitted as Exhibit 15 places it in some context. This is not an area "impliedly open to the public." Any public access to the residence would be at the front door.

The states principal argument is that the Hovanders "aren't entitled to the protection of the exclusionary rule." Brief of Respondent at 18. The state cites but one case in support of this proposition, *United States, v. Salvucci*, 448 U.S. 83, 110 S. Ct. 2547, 65 L.Ed 2d. 619 (1980). *Salvucci*

has been rejected in Washington. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). Even had it not been rejected, *Salvucci* is inapposite. That case applied the Fourth Amendment where the defendants did not claim a privacy right in the area searched, and so were held to have no standing. The *Salvucci* Court remanded the case “so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated.” 448 U.S. at 95.

The Hovanders bring their challenge under Const. art. I § 7, not just the Fourth Amendment. The protection is different and broader than the Fourth Amendment:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

State v. Chenoweth 160 Wn.2d 454, 472 n14, 158 P.3d 595 (2007).

That the appellants are the owners and occupants of the property is not disputed. The question is not whether they have standing to object, but whether the officers’ exploration of their property intruded upon a protected privacy interest. The state ignores the argument that entries to private property which may be lawful during business hours are

considered intrusive in the evening. *State v. Ross, supra*. Nor does the state address appellants' principal argument: that officers intruded upon a protected privacy interest when they wandered around private property at and after dusk instead of immediately approaching the residents. The state argues that officers may wander freely about wooded, rural private property at dusk, searching for evidence of a crime, and, when they find what they want, report that they were in a place from which they were not prohibited when they made their observation. This is not the law in Washington:

Performing a search on private property to gather evidence of criminal activity with warrant in hand is plainly legitimate police business. Performing an open-ended search on private property to gather evidence of criminal activity without a warrant is unconstitutional and is not legitimate police business.

State v. Ross, 141 Wn.2d at 316-17 (Talmadge, J, concurring).

State's Argument B.I.c: Admissibility of Mrs. Hovander's statements. The state argues that this issue does not warrant review for the first time on appeal. We have not argued otherwise.

The state bears a burden to establish that confessions or other statements were voluntary and not coerced. The matter could not be addressed at the 3.6 hearing because the court ruled that the statements were admissible prior to considering the invasion of the appellants'

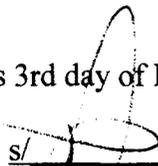
privacy as a factor in determining coercion. Counsel's silence at the time the court ruled is inexplicable.

Should this court affirm the trial court's ruling on the privacy issue, this final issue would be moot. If the court reverses, it is probably also moot, but should the state elect to proceed, a 3.5 hearing at the trial court level would be necessary and appropriate.

II. CONCLUSION

The decision of the trial court should be reversed. The evidence should be suppressed.

RESPECTFULLY SUBMITTED this 3rd day of March 2016.


s/ _____
Jeffrey Steinborn, WSBA # 1938
Attorney for Defendant/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of the document entitled Appellants Opening Brief on the following:

Via First Class U.S. Mail;

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DATED this 3rd day of March, 2016.


Tracee Tomich, Legal Assistant