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NO. ~~70890-8-I~~

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

REC'D  
MAR 26 2014  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHENG SAEPHAN,

Appellant.

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress the drug evidence.

2. The trial court erred in finding probable cause to arrest appellant for felony harassment gave officers lawful authority to make a warrantless entry into appellant's home to effectuate the arrest. RP<sup>1</sup> 90-91.

3. To the extent the trial court found the "emergency aid" exception to the warrant requirement applied such that officer could make a warrantless entry into appellant's home in order to arrest, that finding was in error. Id.

4. The trial court erred in failing to file written findings of fact and conclusions of law following its denial of appellant's motion to suppress the drug evidence.

Issues Pertaining to Assignments of Error

Police responded to appellant's family home after appellant's sister called 911 and reported appellant had returned home from a one-day involuntary mental commitment, was in the basement smoking methamphetamine, was known to carry knives and was threatening to kill

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<sup>1</sup> There are three consecutively paginated volumes of verbatim report of proceedings for the dates of September 4, 2013 (Volume One - pretrial), September 9, 2013 (Volume Two - trial) and September 10-12, 2013 (Volume Three - trial, verdict & sentencing). They are collectively reference herein as "RP".

them. When police arrived, they were directed to an outside door to the basement, which they entered and then called out for appellant to come out with his hands up. Appellant complied, was removed from the home, handcuffed, arrested for harassment, and in a search incident to arrest, methamphetamine was found in appellant's pant pocket.

1. Did the trial court err in denying appellant's motion to suppress the methamphetamine when it was the product of a warrantless entry into appellant's home for which no exceptions to the warrant requirement applied?

2. Did the trial court err in failing to enter written findings of fact and conclusions of law following its denial of appellant's motion to suppress, as required by CrR 3.6(b)?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Cheng Saephan with unlawful possession of methamphetamine and misdemeanor harassment. CP 6-7. The State alleged that on May 10, 2013, Saephan possessed methamphetamine and threatened bodily harm to his sister, Fey Saephan.<sup>2</sup> Id.

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<sup>2</sup> For clarity, Fey Saephan will often be referred to only by her first name in this brief. No disrespect is intended.

A jury trial was held September 9-11, 2013, before the Honorable Douglass North. RP 142-408. Saephan was acquitted of harassment, but convicted of possessing methamphetamine. CP 72-73; RP 404-07. Saephan was sentenced to six months in jail, to be followed by "180 days in Enhanced CCAP" subject to various restrictions. CP 74-83; RP 415. Saephan appeals. CP 84.

2. Relevant Substantive Facts

Saephan filed a pretrial motion to suppress the drug evidence, arguing it was the product of a violation of his right to privacy under the Fourth Amendment and Wash Const. Art. 1, § 7. CP 8-15. Specifically, Saephan argued police violated his state and federal constitutional privacy rights by entering his home without a warrant in order to arrest him for harassment because there was no basis to excuse the warrant requirement before officers entered his home. CP 10-15.

In response, the State claimed a warrant was not required because police lawfully entered Saephan's home under the "emergency aid exception" to the warrant requirement. Supp CP \_\_ (sub no. 46, State's Trial Memorandum, filed 9/4/13) at 8-10. The State claimed that before entering Saephan's home, police were aware of Saephan's unstable mental condition, his threats to harm family members, his past harm to family members, his erratic behavior when under the influence of

methamphetamine, and concerns about his access to and use of knives. Id. at 9-10.

A hearing on the motion was held September 4, 2013. RP 3-91. The court heard testimony from the two Seattle police officers who responded to Fey's May 10th 911 call; Officer Eric Beseler and Officer Richard Bourns.

According to Beseler, he had responded to the Saephan's home several times. RP 6, 14, 46. The first time was on October 29, 2012, when he arrested Saephan for violating a court order precluding him from having contact with his father. RP 43-45.

The second time was May 9, 2013. RP 6. After reviewing his report for that visit, Beseler recalled Fey had called 911 to report her brother's erratic behavior, which involved smoking methamphetamine, speaking gibberish, shouting and "swiping at the air with a knife." RP 10; Pretrial Ex. 1.<sup>3</sup> When Beseler arrived, however, Saephan was merely talking to himself while showering. RP 13. Beseler removed Saephan from the shower and had the Seattle Fire Department (SFD) conduct an evaluation of his behavior, which Beseler noted included "speaking in gibberish, and when he did say things that were legible [sic] he said

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<sup>3</sup> There were seven pretrial exhibits utilized at the hearing, but only Pretrial Ex. 1 was admitted for purposes of the suppression motion. Supp CP \_\_ (sub no. 50, Pretrial Exhibit List, filed 9/13/13); RP 9.

something about spirits and I think he told me that President Obama told me to call him 'Lightning Bolt,' something along those lines." RP 13. According to Beseler's report, Saephan "openly admitted to having used methamphetamine earlier in the day. He was screened by SFD at the scene and later transported to HMV [(Harborview Medical Center)] via AMR for an involuntary mental health evaluation." Pretrial Ex. 1.

Beseler was dispatched to Saephan's home a third time on the early afternoon of May 10, 2013, in response to Fey's claim that her brother was behaving in a threatening manner. RP 14, 27-28. Beseler claimed he had concerns during his May 10th response for both officer safety and the safety of the Saephan family in light of what he knew about Saephan from past encounters. RP 15.

Beseler received the dispatch at 12:41 p.m., he arrived at the home at 12:44 p.m., and Officer Bourn arrived at 12:51 p.m. RP 27-28, 42. Beseler recalled standing outside the home after he arrived to wait for other officers before entering. RP 28. Beseler also recalled being concerned about the potential for Saephan to be armed with a knife in light of his knife-play the day before, and the fact that dispatch had indicated he was known to carry knives. RP 34-35, 42.

Beseler could not recall, however, if he met Fey outside and spoke with her before arresting Saephan, or after. RP 34. He recalled speaking

with her, and that she mentioned her fear that Saephan would kill her and her unborn child, but he could not recall when this conversation took place. RP 16, 34.

Beseler's memory was that he and Bourns entered the home to confront Saephan moments after Bourns arrived. RP 35. But Beseler could not remember which door they entered, whether it was to the upstairs or the basement, whether the door was open or closed, or even whether they announced who they were before entering. RP 17, 34. Likewise, Beseler did not recall Saephan being armed or making threats towards them when they encountered him in the home. RP 37-38.

According to Beseler, when he and Bourns encountered Saephan in the basement, he was in a hallway, and may have made a move as if to go into another room after they he saw them, but that Beseler and Bourns were able to gain physical control and handcuff him without incident. RP 18. Beseler testified it was Bourns who searched Saephan. RP 21.

Like Beseler, Officer Bourns recalled responding to the Saephan's home on May 10, 2013, based on a report that Saephan was making threats to kill members of his family. RP 49-50. According to Bourns, he arrived shortly after Beseler, and saw Beseler contact someone he assumed was Saephan's sister, and then direct Bourns towards a door into the basement. RP 51, 59, 68. Bourns admitted he could not hear what

Beseler and the woman talked about, but he did recall she seemed concerned. RP 51-52, 60-61.

Bourn followed Beseler, who had his gun drawn, into the basement and Beseler then calling out to Saephan to come out with his hands up. RP 52, 70-71, 76. Bourns recalled Saephan appearing in response to Beseler's call with his hands in the air and then coming to a stop about 20 feet in front of them. RP 53, 70. Bourns said Saephan looked confused. RP 53, 71, 76. At that point, according to Bourns, both he and Beseler stepped forward, grabbed Saephan's arms and escorted him out of the house. RP 54, 72. Once they had Saephan out of the house, Beseler put handcuffs on him and then Bourns brought him to his patrol car, searched him incident to arrest and found a lighter and suspected methamphetamine. RP 56-57, 72-73.

No other witnesses testified at the hearing, nor were any exhibits admitted besides Beseler's report for the May 9, 2013 incident, Pretrial Ex. 1. Argument by the parties focused on whether there was a basis to conclude Fey told Beseler of Saephan's alleged threats to kill before the officers went into the basement and arrested Saephan. Defense counsel claimed there was not. RP 77-81, 85-87, 89-90. The State argued there was, and that such information was sufficient to justify a warrantless entry into the home under the "emergency doctrine." RP 79-80, 83-84, 87-89.

In denying Saephan's motion to suppress, the trial court made the following oral ruling:

Okay. I'm going to deny the motion to suppress the evidence. I find that the evidence preponderates in favor of the view that, in fact, Officer Beseler did know about specific threats from [Fey] Saephan prior to entering into the house. Certainly, you could -- I mean it's something that you could try to a jury and the jury might find differently; but I think that the best evidence suggests that that's what occurred because Officer Bourns clearly saw Officer Beseler talking to [Fey] Saephan at the time that he arrived and parked his car and then came up.

Officer Beseler certainly was clear that at some point, [Fey] Saephan has said that the Defendant had threatened to kill her and her unborn child. He wasn't real clear on when that occurred; but the evidence, given Officer Bourns' testimony, preponderates that, in fact, that occurred before they went into the house and, therefore, there was probable cause to enter the house and arrest Mr. Saephan.

The other thing is is that I think that if one takes the reasonably trustworthy information that was available to him, the Officer was allowed to also consider information that was brought [sic] by dispatch as well, but that's a separate ruling. I think that either way, there's a basis on which they had probable cause to arrest Mr. Saephan.

RP 90-91. No written findings of fact or conclusion of law have been filed with regard to this ruling.

C. ARGUMENTS

1. THE WARRANTLESS ENTRY INTO THE HOME VIOLATED SAEPHAN'S PRIVACY RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The warrantless entry into Saephan's home was unlawful because no exception to the warrant requirement applied. Mere probable cause to arrest is insufficient to excuse a warrantless entry into a private home. The "emergency aid" exception does not apply because there was no reasonable basis to conclude Saephan or anyone else in the home was in need of immediate assistance to protect them against physical harm. Nor is there any other applicable exception to the requirement that officers obtain a warrant before invading a private home. Therefore this Court should reverse Saephan's conviction, order the drug evidence suppressed and dismiss the charge with prejudice.

a. Standard of Review

The trial court's conclusions of law in a suppression hearing are reviewed de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's findings must support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence must support those findings. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

b. Nowhere Is The Warrant Requirement More Stringent Than When Police Invade A Private Home.

Article I, section 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment of the United States Constitution establishes the peoples' right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Given the vital interest at stake, people must not be left secure in the privacy of their home only in the discretion of police officers. Johnson v. United States, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948). "The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" United States v. Karo, 468 U.S. 705, 717, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (quoting Johnson, 333 U.S. at 14).

A warrantless search is per se unconstitutional unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334 (1993). "Exceptions to the warrant requirement are limited and narrowly drawn." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the "heavy burden"

of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). The State therefore has the burden of establishing an exception to the warrant requirement by "clear and convincing evidence." Garvin, 166 Wn.2d at 250.

"The distinction between searches of a private home from searches of automobiles or public places is very important under a Fourth Amendment analysis, and even more so under art. I, § 7 review." State v. Schroeder, 109 Wn. App. 30, 40, 32 P.3d 1022(2001). Constitutional privacy protections are strongest in the home because that is where a citizen is most entitled to privacy. U.S. Const. amend. IV; Wash. Const. art. I, §7; Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L.Ed.2d 639 (1980) ("the Fourth Amendment has drawn a firm line at the entrance to the house"); State v. Ruem, 179 Wn.2d 195, 313 P.3d 1156, 1160 (2013)("Constitutional protections of privacy are strongest in the home"); State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) ("the home receives heightened constitutional protection"). "For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Young 123 Wn.2d at 185 (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

Police conduct in this case must be analyzed with these established principles in mind.

c. The Emergency Aid Exception Did Not Justify The Warrantless Entry into Saephan's Home.

The only justification offered by the State for the warrantless entry into Saephan's home by officers Beseler and Bourns was the "emergency aid" exception to the warrant requirement. Supp CP \_\_ (sub no. 46, supra); RP 89. This exception arises in conjunction with law enforcement's community caretaking function. State v. Schultz, 170 Wn.2d 746, 754, 248 P.3d 484 (2011). It "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." State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). An intrusion is justified under the community caretaking function only if the following factors are met;

"(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.

Schultz, 177 Wn.2d at 754 (quoting Thompson, 151 Wn.2d at 802).<sup>4</sup>

To satisfy the exception, the State must show the officers, both subjectively and objectively, were "actually motivated by a perceived need to render aid or assistance." State v. Angelos, 86 Wn. App. 253, 256, 936 P.2d 52 (1997) (quoting State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982)). "The State must prove both the subjective and objective elements." State v. Dempsey, 88 Wn. App. 918, 923, 947 P.2d 265 (1997). In this regard, the officers must be able to articulate specific facts and reasonable inferences drawn from those facts to justify a warrantless search under the community caretaking exception. State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110, 1114 (1997).

A proper community caretaking function is separate from a criminal investigation. State v. Kinzy, 141 Wn.2d 373, 388, 395, 5 P.3d 668 (2000). Police must be motivated by "noncriminal noninvestigatory purposes." Thompson, 151 Wn.2d at 802 (quoting Kalmas v. Wagner, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)). When invoking this exception, the State must therefore prove "the claimed emergency is not merely a pretext for conducting an evidentiary search." State v. Leffler, 142 Wn. App. 175, 182,

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<sup>4</sup> Internal citations omitted.

178 P.3d 1042 (2007) (citing State v. Schlieker, 115 Wn. App. 264, 270, 62 P.3d 520 (2003)).

Police may conduct a noncriminal investigation only "so long as it is necessary and strictly relevant to performance of the community caretaking function." Kinzy, 141 Wn.2d at 395. Put another way, a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." State v. Gibson, 104 Wn. App. 792, 797, 17 P.3d 635 (2001) (quoting Mincey v. Arizona, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (quoting Terry v. Ohio, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968))). "Thus, officers conducting a search under the emergency exception may not exceed 'the scope of a reasonable search to effectuate the purpose of the entry.'" Gibson, 104 Wn. App. at 797 (quoting State v. Bakke, 44 Wn. App. 830, 841, 723 P.2d 534 (1986)).

The emergency aid exception did not justify the officers' entry into Saephan's home for several reasons. First, the State failed to present evidence to support finding the six factors set forth in Schultz. Although officers Beseler and Bourns both testified they had concerns for the safety of Saephan's family members still in the home, it is apparent they entered the home not with the perceived need to render aid to those individuals, nor for any other "noncriminal noninvestigatory purposes." Thompson, 151 Wn.2d at 802 (quoting Kalmas v. Wagner, 133 Wn.2d at 216-17).

To the contrary, the actions of the officers before and after entering the home make clear their intent all along was to arrest Saephan for the crime of harassment, not to render aid. The officers did not call out to see if anyone was injured, they did not claim they ever checked on anyone else in the home before or after they removed Saephan, and they gave no indication they had concern for Saephan's health and safety. Instead, as Bourns recalled, Beseler entered with his gun drawn and ordering Saephan to come out with his hands up. RP 71. The only reasonable conclusion to draw from the evidence at the suppression hearing is that the officers entered the home for the sole purpose of arresting Saephan for harassment.

And that is essentially what the trial court found. It denied the suppression motion on the basis that there was probable cause to arrest Saephan. RP 90-91. Notably absent from the ruling, however, is any finding the officers had lawful authority to enter the home based on a valid exception to the warrant requirement. And that is why reversal is required.

The State failed to carry its heavy burden of showing by clear and convincing evidence that officers Beseler and Bourns' entry into Saephan's home was justified under the community caretaking exception, or any other exception. Nor did the trial court make such a finding. Rather, the trial court errantly concluded probable cause to arrest was all that was needed. RP 90-91. The court failed to consider the Schultz factors and failed to find the

officers' entry into the home was for "noncriminal noninvestigatory purposes." Thompson, 151 Wn.2d at 802 (quoting Kalmas v. Wagner, 133 Wn.2d at 216-17).

Whether that probable cause was the product of Beseler's conversation with Fey before entering the home, or instead based on the information relayed by police dispatch, is irrelevant, despite the trial court's concerns in this regard. Probable cause to arrest is antithetical to the emergency aid exception because it necessarily indicates a primary purpose of criminal investigation rather than to provide aid to imperiled persons. The trial court erred in denying Saephan's motion to suppress on the basis that there was probable cause to arrest.

d. Unlawfully Obtained Evidence Must Be Suppressed  
And the Charge Dismissed With Prejudice.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. Evidence is fruit of an illegal search when it "has been come at by exploitation of the primary illegality." Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Officer Bourns discovery of drugs in Saephan's pant pocket was a direct consequence of the unconstitutional seizure of Saephan. Therefore,

this Court should reverse Saephan's conviction and dismiss the charge with prejudice because no evidence remains to support the drug possession charge. Kinzy, 141 Wn.2d at 393-94 (no basis remained for conviction because Court concluded motion to suppress evidence should have been granted); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

2. THE TRIAL COURT VIOLATED CrR 3.6 BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Trial courts are required to enter written findings of fact and conclusions of law after a hearing on a motion to admit an accused's statements or to suppress evidence. CrR 3.5(c); CrR 3.6 (b); State v. Hickman, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

The purpose of written findings and conclusions is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993).

When the trial court fails to enter findings and conclusions, “there will be a strong presumption that dismissal is the appropriate remedy.” State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court’s failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions).

This Court should remand for entry of complete and thorough findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (if trial court fails to enter a finding as to an element of the crime charged, the appropriate remedy is to vacate and remand for appropriate findings).

D. CONCLUSION

For the reasons stated herein, this Court should reverse Saephan's conviction and dismiss the charge with prejudice.

DATED this 26<sup>th</sup> day of March 2014

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70898-8-1
	)	
CHENG SAEPHAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF MARCH, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHENG SAEPHAN  
2402 S. MORGAN STREET  
SEATTLE, WA 98105

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF MARCH, 2014.

x *Patrick Mayovsky*