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No. 33852-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

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DEPUTY

STATE OF WASHINGTON,
Respondent

v.

BRITNEY KAYE FLOWERS
Appellant

OPENING BRIEF OF APPELLANT BRITNEY FLOWERS

Appeal from the Superior Court of Pierce County,
Cause No. 05-1-00881-6
The Honorable Ronald E. Culpepper, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Error is assigned to the following Findings from the "Findings and Conclusions on Admissibility of Evidence CrR 3.6":

Finding of Fact No. 1: "On February 19, 2005, at 5:16 p.m., the Pierce County 911 dispatch center received an anonymous call regarding a residence located at 14705 9th Ave. Court East in Pierce County. The caller reported a strong chemical smell coming from the small shed next to the main house." CP 40.

Finding of Fact No. 2: "The caller reported that the door to the shed was open and there was someone inside. The caller reported that there was a heater or a read glow coming from inside the shed." CP 40.

Finding of Fact No. 3: "The caller described the dimensions of the shed as being 10 feet tall, 6 feet wide, and 3 feet deep. CP 41.

Finding of Fact No. 4: "The caller reported that Britney Flowers lives in the house, but there are usually other people there as well. CP 41.

Finding of Fact No. 5: "The caller was later identified as Aaron McConnell. McConnell's home is approximately 35 feet away from Flowers [sic] residence. McConnell lived in his home with his pregnant wife and young child. CP 41.

Finding of Fact No. 6: "At 6:30 p.m., Pierce County Sheriff's Deputies Jason Smith and Robert Johanson arrived at the property. The gate on the driveway to the residence was open. There were no "no trespassing" signs posted. The driveway is a common driveway that is also used by Aaron McConnell and his family to enter and exit his property." CP 41.

Finding of Fact No. 7: "As Deputies Smith and Johanson were driving up the driveway, they observed Otis Vella walk over to a shed on the southwest side of the house (circled in red in defendant's exhibit no. 2) and appeared to lock it." CP 41.

Finding of Fact No. 8: "Vella then walked back toward the front of the home and approached Deputy Johanson's patrol vehicle." CP 41.

Finding of Fact No. 9: "When Deputy Johanson exited the patrol [sic] he could smell a faint odor of ammonia, which he knew from his training and experience to be associated with the presence of a clandestine methamphetamine lab. Deputy Johnson [sic] contacted Vella in the yard near the driveway. Deputy Johanson asked Vella if he lived on the premises and Vella said that he did not and that he was just visiting the person who lives there. Vella stated that the resident was visiting her grandparents on the lower property. When Vella was asked if anyone was inside of the house, he replied no." CP 41.

Finding of Fact No. 10: "When Deputy Smith exited his patrol vehicle he also smelled a faint odor of ammonia that he knew from his training and experience was consistent with the existence of a clandestine methamphetamine lab in the area. Deputy Smith also spoke with Vella in the yard near the driveway. Vella told Deputy Smith that he had been cutting and burning wood for the resident, Britney Flowers. When asked why he had gone over to the shed and locked it as the deputies were approaching in their vehicles, Vella stated that he did not know the police were coming down the driveway and that he had just put the chainsaw away." CP 42.

Finding of Fact No. 11: "Deputy Smith walked over to the shed and saw a chainsaw sitting near the fire pit in front of the shed. Deputy Smith walked around the fire pit and noticed a strong odor of ammonia in the area of the shed." CP 42.

Finding of Fact No. 12: "While Deputy Johanson was speaking with Otis Vella, Britney Flowers walked up from the neighbor's house that was on a lower piece of property. Flowers walked past the shed on the southwest side of the house and approached Deputy Johanson who informed her why they were there. Flowers denied that there was a meth lab on the property. Flowers reported that when she returned home from work, there were several people on the property and that she told everyone to leave. Flowers was not sure if anyone was inside the house. CP 42.

Finding of Fact No. 13: "Deputy Johanson and Flowers walked to the back side of the house to a wood shed. Flowers was not informed that she had a right to refuse the search of the shed on the backside of the house. The shed was opened, but there were no signs of a meth lab in that shed." CP 42.

Finding of Fact No. 14: "Deputy Smith asked Vella if he was carrying any weapons and Vella told him that he had a small pocket knife in his pants pocket. Deputy Smith learned that Deputy Johanson had already recovered one pocket knife from Vella. Deputy Smith did a pat down search and removed a small pocket knife from Vella's right front pants pocket." CP 42.

Finding of Fact No. 15: "Deputy Johanson and Deputy Smith decided to detained [sic] Britney Flowers and Otis Vella and placed in [sic] them into handcuffs at 6:49 p.m. Vella and Flowers were placed in separate patrol vehicles. CP 43.

Finding of Fact No. 16: "Deputy Smith, Johanson, and two other deputies searched the main home for people. Flowers was not advised of her Ferrier [sic] warnings. The deputies found no one inside the residence and did not obtain any physical evidence." CP 43.

Finding of Fact No. 17: "After the house was cleared, Deputy Johanson walked over to the shed (circled in red on

defendant's exhibit no. 2). Deputy Johanson could smell a strong ammonia odor coming from the shed." CP 43.

Finding of Fact No. 18: "Deputies Smith and Johanson requested assistance from the Pierce County Clandestine Methamphetamine Lab Team. Deputy Tony Messineo arrived at 7:19 p.m. and was the first team member to respond. He was briefed by Deputies Smith and Johanson about the situation." CP 43.

Finding of Fact No. 19: "Deputy Messineo also walked around the shed on the southwest side of the house (circled in red in defendant's exhibit no. 2). There, he smelled an odor of ammonia at the back of the shed, which he recognized from his training and experience as being consistent with the odor commonly found at the scene of clandestine methamphetamine labs." CP 43.

Finding of Fact No. 20: "Deputy Messineo observed that there was a padlock on the only door to the shed. In the eaves of the front of the shed there appeared to be an exhaust tube, and there was clothing filling the gap between the roof and the wall. On the rear wall of the shed was a hole with an electric fan inside. The fan was off and there was no ventilation of the vapors coming from inside the shed." CP 43.

Finding of Fact No. 21: "Deputy Messineo then contacted Flowers who was handcuffed in the back of the patrol car. Flowers stated that she lived at the residence with her boyfriend Otis Vella. Flowers stated that she lived at the residence with her boyfriend Otis Vella. Flowers stated that she rented the shed on the south side of the property (circled in red in defendant's exhibit no. 2) to "Dave." Flowers stated that Cornell had been renting the shed for approximately one to one and a half months. CP 44.

Finding of Fact No. 22: "Flowers denied ever smelling a chemical smell around the shed. Flowers stated that she did not know what was in the shed. Flowers admitted that

she used methamphetamine, but denied getting it from Cornell. Flowers said she was at work and when she got home Vella and several other cars or people were there and she kicked them out. Flowers stated that she did not know where Cornell was. CP 44.

Finding of Fact No. 23: Deputy Messineo then contacted Vella who was handcuffed and seated in the back of a different patrol car. Vella told Deputy Messineo that he had been dating Flowers for about two months, but he does not live with her. He said he had been at the residence earlier in the day and came back with friends. Vella stated the [sic] Flowers arrived home from work at approximately 3:30 -4:00 p.m. and wanted everyone to leave, so he told them to leave. Vella stated that Cornell came over at approximately 3:30-4:00 p.m. and wanted everyone to leave, so he told them to leave. Vella stated that Cornell came over at approximately earlier [sic] in the afternoon and opened the shed for him so he could use the chainsaw that was in the shed to cut firewood. Vella stated that Cornell had left and told him to close and lock the shed when he was done. CP 44.

Finding of Fact No. 24: "Deputy Messineo noticed a vehicle on the property that had a dog inside of it. Vella Told Deputy Messineo that the vehicle belonged to David Cornell. Deputy Messineo suspected that David Cornell was still on the property and that he might be locked inside the shed. CP 44.

Finding of Fact No. 27: "Deputy Messineo has learned from his training and experience that suspects will sometimes lock themselves inside meth labs in order to avoid detection by police. CP 45.

Finding of Fact No. 29: " Deputy Mark Gosling arrived at 8:08 p.m. Deputy Gosling is also a member of the Pierce County Sheriff's Department Clandestine Methamphetamine lab team. He spoke with Deputy Messineo about the situation and concurred with his

determination that Cornell may be locked inside the shed. " CP 45.

Finding of Fact No. 30: "Deputy Gosling walked to the shed and could smell ammonia and solvents. He saw there was a hole in the rear wall of the shed that had a fan inside of it, but the fan was off. There was no way to enter or exit the shed except by going through the locked door." CP 45.

Finding of Fact No. 32: "Deputy Gosling and Deputy Messineo decided to force open the door out of concern that Cornell may be locked inside the shed with no ventilation and may be incapacitated by the chemical vapors filling the inside the [sic] shed." CP 46.

Finding of Fact No. 34: "There was a strong odor of ammonia and chemicals that emanated from the shed when the door was opened." CP 46.

Finding of Fact No. 35: "Cornell appeared to be disoriented and was slow to respond to verbal commands. Cornell was taken into custody. Approximately 30 seconds later, The [sic] fire department was called for purposes of a "wet decontamination."" CP 46.

Finding of Fact No. 36: "Cornell complained that he was not feeling well. Approximately two minutes after the first call to the fire department, Deputy Messineo recontacted the fire department to ask them to step up the response to a priority call due to Cornell's ammonia exposure." CP 46.

Finding of Fact No. 37: "The testimony of Pierce County Sheriff Deputies Smith, Johanson, Christian, Messineo, and Gosling was credible." CP 46.

2. Error is assigned to the following "Reasons for

Admissibility or Inadmissibility of Evidence":

"Evidence obtained during the deputies' entry onto the curtilage of Flower's [sic] residence is admissible because the deputies were there on legitimate police business investigating a potential hazardous crime, and were not on the property merely to gather evidence. The deputies stayed within areas of the curtilage which were impliedly open and acted in the same manner as a reasonable respectful citizen." CP 49.

"Any evidence obtained during the forced entry into the shed is admissible for the following reasons: 1) Deputy Messineo subjectively believed that Cornell was locked in the shed and needed assistance for health and safety reasons, 2) a reasonable person in the same situation would have believed there was a need for assistance, 3) there was a reasonable basis to associate the need for assistance with the place to be searched (the shed), and 4) the forced entry of the shed was not merely a pretext for conducting an evidentiary search."

3. The trial court erred when it found that the warrantless, forced entry into the shed (circled in red on Plaintiff's Ex. 4) was lawful under the emergency exception to the warrant requirement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are the findings entered by the trial court pursuant to its ruling in the 3.5/3.6 hearing supported by substantial evidence? (Assignment of Error No. 1)

2. Was the initial, warrantless breach of the shed valid under the "emergency" or "exigency" exception to the warrant requirement? (Assignment of Error No. 2)

3. Did the deputies lawfully stay within areas of the curtilage and in so doing did they act in the same manner as a reasonable, respectful citizen? (Assignment of Error No. 2)
4. Was the deputies' initial entry onto the property and breach of the shed a mere pretext to gather evidence to support the subsequent search warrant? (Assignment of Error No. 2)
5. Should the deputies have given the Ferrier warnings to Ms. Flowers before searching her property? (Assignment of Error No. 2, 3)

C. STATEMENT OF THE CASE

Procedural Background

The State charged Britney Flowers by Information as an accomplice with one count of manufacturing a controlled substance, methamphetamine (RCW 69.50.401(1)(2)(b)). CP 1-3. Ms. Flowers filed a motion to suppress evidence of an illegal search. CP 17; CP 18-24. A 3.5/3.6 hearing was held below beginning on May 12, 2005 before Pierce County Superior Court Judge Stephanie Arend. 3.5/3.6 RP Volumes 1 through 3. At the conclusion of the 3.5/3.6 hearing, the Court found that the Deputies' initial entry into Ms. Flowers' residence was unlawful because it was not a "protective sweep" and was done without advising Ms. Flowers of her Ferrier warnings [there was no evidence found during that search]. CP 49. The Court also held that any evidence obtained during the search of the shed on the back of Ms. Flowers' house was inadmissible because that search was done without advising Ms. Flowers

that she had a right to refuse [no evidence was found during this search]. CP 49. However, the Court upheld the warrantless, forced entry into the shed where David Cornell was found and thus all information and evidence obtained during that forced entry was found to be admissible. CP 49,50.

A jury trial was held beginning on August 22, 2005, with Pierce County Superior Court Judge Ronald Culpepper presiding. Appellant Britney Kaye Flowers' case was tried jointly below with co-defendant David Cornell. RP Trial, 1-1243 (Volumes 1-7). On September 7, 2005, Ms. Flowers was found guilty of Manufacturing a Controlled Substance (Methamphetamine) as charged in Count I. RP Trial at 1238; CP 111. On September 16, 2005, Ms. Flowers was sentenced to the low end of the standard sentencing range (68 months). CP 150-162; RP Trial, 1254-1258. A timely notice of appeal was filed.

Factual Background (3.5/3.6 Hearing)

On February 19, 2005, at around 1716 hours, an anonymous citizen called 911 in Pierce County, Washington, and reported that he had smelled a strong chemical odor coming from a shed located on property adjacent to his at 14705 9th Ave. Court East, Tacoma, Washington. 3.5/3.6 RP, 19, 45, 65, 100. The anonymous tipster also noted that he had seen "men" on the property, and had seen a burner and a "red glow"

coming from inside the shed¹ (hereinafter "the shed") on the adjacent property. Id. RP 19, 45. The shed mentioned by the 911 caller is located about a "couple hundred feet" from the main road." 3.5/3.6 RP 25. The property is gated, but the gate was usually left open. Id. From the gate forward is a private driveway leading to the houses on the property. Id. 34. There were three homes on the property, one lived in by Britney Flowers, the other resided in by Aaron McConnell, and the other occupied by McConnell's great uncle. 3.5/3.6 RP 33.

At the 3.5/3.6 hearing, Aaron McConnell testified that he lived in the home next to Ms. Flowers, and that he was the person who had called 911 on February 19, 2005. 3.5/3.6 RP 22. McConnell's house is about thirty feet away from Ms. Flowers' residence. 3.5/3.6 RP 18. David Cornell, Ms. Flowers' co-defendant, rented one of the sheds (the shed circled in red on Plaintiff's exhibit 1) located on Ms. Flowers' property for \$50 per month. 3.5/3.6 RP 8. Cornell said he used the shed to store personal items and tools, and that he also spent time at Ms. Flowers' house because they were friends. Id. 9-11. Ms. Flowers told Deputy Messineo that David Cornell had been renting the shed from her for about a month-and-a-half. 3.5/3.6 RP 166. David Cornell said he had rented the shed for "probably a week or two." 3.5/3.6 RP 8.

¹ Unless otherwise indicated, the shed circled in red on Plaintiff's Exhibit No. 1 (admitted at the 3.5/3.6 hearing) will be referred to in the remainder of this document as "the shed."

At the 3.6 hearing, Aaron McConnell said that he had seen Ms. Flowers in the shed a couple of days prior to February 19, 2005, and "on numerous occasions in the months prior to that." 3.5/3.6 RP 22. February 19, 2005, was the first time that Aaron McConnell had noticed the chemical or ammonia smell coming from the shed on the property. 3.5/3.6 RP 22.

At 1819 hours on February 19, 2005, Deputy Johansen and Deputy Smith were two of the deputies dispatched to 14705 9th Ave. Court East because of the 911 call, in which the caller, "said they [sic] believed they smelled some strange chemicals at the house or coming from one of the sheds." 3.5/3.6 RP, 52, 65. The deputies were not dispatched to the property until about an hour after the original 911 call came in because "all of [the 911 calls] are listed on a priority scale." 3.5/3.6 RP 64.

When deputies arrived at the property, they saw Otis Vella jiggling the lock on the shed as if he were locking it from the outside. 3.5/3.6 RP 53. Deputies then walked towards Mr. Vella and after speaking with him, deputies walked to the shed. 3.5/3.6 RP 53. Deputy Johansen said that when they arrived at the property, they were "doing an investigation to see what's going on at the house. . . . and were "investigating. . . . for a possible meth lab." 3.5/3.6 RP 66, 68 (emphasis added). When asked if he was there to search for a meth lab, Deputy Johanson stated, "we were

investigating, yeah." 3.5/3.6 RP 68 (emphasis added). When Deputy Johansen said that when he got out of his car, he could smell a faint "ammonia smell." 3.5/3.6 RP 56.

Deputy Johanson had information from the 911 call that indicated Britney Flowers occupied the residence. 3.5/3.6 RP 53. When asked whether he advised Ms. Flowers that she had a right to refuse his search of the property Deputy Johansen stated, "I did not give her warnings." 3.5/3.6 RP 68. Deputy Johanson admitted they were on a "knock and talk." 3.5/3.6 RP 68. Deputy Johanson also said that from the information received from the 911 call, when they got to the property they were looking for a "shed." 3.5/3.6 RP 70. Deputies did not have a search warrant at that time. 3.5/3.6 RP 66.

Mr. Vella told deputies that he was visiting a friend who lived at the residence, but that she was down at the house below visiting her grandfather, and that no one was in the house. Id. The female, later identified as Britney Flowers, then came walking up from the trail. Id. Deputy Johansen contacted Ms. Flowers and told her that they'd gotten a call that there was possibly a meth lab on the property. Id. Ms. Flowers responded that there "was not." Id. 57. When asked if there was anyone else on the property, Ms. Flowers said there had been people there earlier

when she returned from work, but she had asked them to leave. 3.5/3.6 RP 57.

When Deputy Johansen was walking "towards the back of that area where the house was" with Ms. Flowers, he noticed a "wood shed" (a different shed behind her house) on the property and asked Ms. Flowers what was in the wood shed. Id. Ms. Flowers walked over to that shed, opened the door and said "nothing." 3.5/3.6 RP, 57, 58. Deputy Johansen looked into that shed, did not see anything or anyone, and walked back to where Deputy Smith and Mr. Vella were located. Id. Deputy Johansen then asked Ms. Flowers to stay where she was, so that he could talk about "the smell" with Deputy Smith. 5/12/05 RP 58. Deputy Johanson did not ask Ms. Flowers for permission to search the property. 5/12/05 RP, 67.

In response to Deputy Smith's saying he still smelled an odor, deputies "agreed" that they should detain Ms. Flowers and Mr. Vella for "their safety" because they did not know who else was around. 3.5/3.6 RP 59, 62. Deputy Johansen said, "[w]e felt concern that we had a possible meth lab inside that shed, so we detained Britney and Mr. Vella for our safety, and we called for an additional unit to arrive on scene before we searched the house for people." Id. 59. Deputy Smith stated that "at that point because of all of these inconsistencies and to further the investigation I detained [Mr. Villa]." 3.5/3.6 RP 93 (emphasis added).

Deputy Smith went on to say, "during our investigation , our attention is drawn to certain areas we can't just keep eyes on the people that we're investigating. . . we needed to make sure they were going to stay on the scene and not take off when we were investigating the property." 3.5/3.6 RP 94 (emphasis added). Deputy Smith said several times that the reason police were on the property was because they were "investigating the property" (3.5/3.6 RP 94) and that they were there "to investigate the possible meth lab." 3.5/3.6 RP 99 (emphasis added). In Deputy Smith's opinion, Vella and Flowers were detained while the police "investigate whatever we're investigating." 3.5/3.6 RP 120 (emphasis added).

After detaining Mr. Vella and Ms. Flowers in separate patrol cars, deputies then "entered the house to clear it for people." 3.5/3.6 RP 59, 62, 67. The house was searched at about 1859 hours. 3.5/3.6 RP 100.

After being on the property for about "nineteen minutes" Deputy Smith told Deputy Johanson that he smelled the chemical smell the strongest over by the shed, and that he believed there was a meth lab there. 3.5/3.6 RP 58, 79. Deputies said there were vents coming "out of the shed as well, tubing that one [sic] was on the front and one was on the back as well." 3.5/3.6 RP 63. Deputy Smith said that according to the "CAD" log of the 911 call (CP 25), the caller had seen, "a glowing heater

in there [the shed] extension cords leading out there" which led them to believe that a meth lab was possibly in the shed. 3.5/3.6 RP 115, 116. Then, "[o]nce we had the house clear . . . we asked dispatch for a member of the lab team to come out and evaluate the scene." 3.5/3.6 RP 63. When asked why a member of the meth lab team was requested, the deputy stated, "[b]ecause we believed that there was a meth lab inside the shed." Id. Another deputy said, "the call was about a meth lab and that was the nature of the investigation." 3.5/3.6 RP 145 (emphasis added).

Otis Vella told Deputy Smith that he had been locking up the chain saw in the shed. 3.5/3.6 RP 90. Deputy Smith then walked over to the area of the fire pit and noticed a stronger smell of ammonia or chemical smell, and while doing so Deputy Smith also noted that a chainsaw was still outside, so Deputy Smith decided that Mr. Villa had not been telling the truth. 3.5/3.6 RP 90. Deputy Smith said at the 3.5/3.6 hearing that there were other inconsistencies in what Villa had told him, even though Deputy Smith did not put all of that information in his police report. Id. 92.

Upon detaining Ms. Flowers and Mr. Vella, Mr. Vella handed over a knife to Deputy Johansen and when Mr. Villa was patted down by Deputy Smith, a pocket knife was found which Deputy Smith said "was no big threat." 3.5/3.6 RP. 94. Ms. Flowers was put into handcuffs and was

read her Miranda warnings. Id. Ms. Flowers and Mr. Vella were both detained at about 18:49 hours and were placed into separate patrol cars. 5/12/05 RP 61, 80. Officers then walked up to Ms. Flowers' residence, knocked at the front of the house, said they were the Pierce County Sheriff's Department and said to "come out and make yourself known" and then entered the house to "clear it for people." 5/12/05 RP 62, 95. There were no people inside Ms. Flowers' residence. Id. The Deputies did not ask for Ms. Flowers' permission to enter the residence, (Id. 67), nor did they give her the Ferrier warnings before searching the property. 3.5/3.6 RP 68, 200.

Deputy Johanson said that he did not have any indication that someone might be inside one of the sheds. RP 74. There were no sounds coming from the shed, no cries for help, nor was there any light coming from inside the shed. 3.5/3.6 RP 74, 196. Deputies also admitted that before the deputies breached the shed on the property there was no indication that there was anyone armed or dangerous, anyone in need of immediate medical attention, anyone arguing or fighting, or that there was a felon in flight scenario. Id. RP 70, 71, 104, 144, 145.

At about 1907 hours, Deputy Messineo received a page from Deputy Christian, informing him that Deputy Christian was at a possible meth lab, and Deputy Messineo was asked to come to the scene. 3.5/3.6

RP 136, 157. While enroute, Deputy Messineo contacted Deputy Gosling, who is the warrant writer for the team. 3.5/3.6 RP 191, 224. Deputy Gosling arrived at about 8:00 p.m. 3.5/3.6 RP 224. Deputy Gosling said, "my job was to go to the scene, [and to] determine if there was p/c to request a search warrant." 3.5/3.6 RP 224. Deputy Messineo arrived at about 1919 hours. 3.5/3.6 RP 136, 157. When Deputy Messineo arrived, he was briefed and then walked to the shed where the suspected meth lab was and he smelled what he recognized to be anhydrous ammonia. 3.5/3.6 RP 158.

Ms. Flowers told Deputy Messineo that the house was her residence. 3.5/3.6 RP 214. Deputy Messineo did not go to the front door of Ms. Flowers' residence when he arrived, but went to the shed. 3.5/3.6 RP 200, 201. Deputy Messineo testified that he is familiar with "knock and talk" procedures and the Ferrier warnings, but agreed that he did not follow that procedure in this case. 3.5/3.6 RP 200, 215. Messineo did not smell anything until he got to the shed. Id. 159. Deputy Messineo noted that the shed was padlocked from the outside, and he saw an exhaust tube in the eaves of the front of the shed, clothes or cloth stuffed in eaves of the shed, and an exhaust fan at the back of the shed. 3.5/3.6 RP 159.

According to one of the deputies on the scene, Deputy Messineo made the decision under "basically exigent circumstances" that they

should break into the shed which had been locked from the outside.

5/12/05 RP 97. Deputy Messineo was on the scene for one hour before breaking into the shed. 3.5/3.6 RP 139, 220. Paramedics were not called before Deputy Messineo decided to break into the shed. 3.5/3.6 RP 196.

When breaking into the shed, Deputy Messineo announced numerous times at the door of the shed "make yourself known," (Id. at 64) and "Police. Are you in there? Identify yourself. Come out if you can," but there was no answer. 3.5/3.6 RP 133. Deputy Messineo then tried to open the door to the shed, "and he pried open the door and attempted to open it and it wouldn't open even though the lock had been open. He then found a nearby ax . . . and got the door open and [David Cornell] was found sitting inside." 3.5/3.6 RP 133. Deputy Christian had his weapon drawn to "cover" Deputy Messineo as he was breaking down the door to the shed. 3.5/3.6 RP 133.

When Deputy Messineo saw Cornell in the shed he "ordered him to stand up and exit the shed. He did not respond. Ordered him again [sic]. He did not respond, and so Deputy Messineo placed his hands on him and took him out of the shed, and we took him to the ground because we thought he was being non-compliant, and I [Deputy Christian] handcuffed him." 3.5/3.6 RP 134. Deputy Smith said they ordered Cornell to "come out with your hands up." 3.5/3.6 RP 112. "We're telling

him these orders 'come out, come out.' He wouldn't do it, so we had him come to the ground." 3.5/3.6 RP 98. Deputy Smith said they pulled Cornell out, "put him on the ground and placed him in custody." 3.5/3.6 RP 98. Deputy Gosling, who was nearby when Deputy Messineo broke into the shed, said that after Cornell was out of the shed "[h]e was patted down. He was taken into custody." 3.5/3.6 RP 228, 229. Deputy Messineo said that once he broke down the door of the shed and saw Mr. Cornell inside, "[w]e ordered him out and took him into custody." 3.5/3.6 RP 175.

After taking Mr. Cornell out of the shed, Deputy Messineo did an "assessment" of the lab in the shed. 3.5/3.6 RP 184. Deputy Messineo said, "I didn't have to go in [the shed]. I could stay outside and look in the whole thing." 3.5/3.6 RP 184. Deputy Messineo explained that an "assessment" is done after the p/c that there is a lab and it is to determine the types of chemicals and type of hazards that may be confronted by the lab team. Id. at 236.

Once Mr. Cornell was removed from the shed, fire department personnel were called and they performed decontamination on Mr. Cornell. 3.5/3.6 RP 98. Ms. Flowers, Mr. Vella and Mr. Cornell were taken to jail. Id. After all of these events, Deputy Gosling wrote the

affidavit for a search warrant, which was applied for the next day. 3.5/3.6 RP 255. Deputy Gosling went to the golf course to have a judge sign the warrant. Id. Deputy Gosling said that his unit does not use telephonic warrants, but also admitted that if he needed to get a warrant quickly, that he could figure out how to apply for one telephonically. 3.5/3.6 RP 256. When executing the search warrant deputies found approximately 296 items (RP Trial 739) which, according to deputies, are commonly associated with the manufacture of methamphetamine in both the shed where David Cornell had been found, and in Ms. Flowers' residence. CP 83-94; RP Trial, 773-852. The bulk of this evidence was found in the shed where deputies found David Cornell. CP 2,3.

At the close of the evidence and arguments at the suppression hearing, the Court upheld the warrantless, forced entry into the shed where Mr. Cornell was found. CP 48, 49. The Court also found that the deputies' initial entry into Ms. Flowers' home was improper because there was no basis for doing a "protective sweep" of the residence and there were no Ferrier warnings given. 3.5/3.6 RP 307, 308; CP 48. The trial court also found that the search of the other shed (the shed behind the house) was improper because Deputy Johanson had not given Ms. Flowers the proper Ferrier warnings before going into that shed. 3.5/3.6 RP 302,

303; CP 48. Ms. Flowers now appeals the trial court's denial of her motion to suppress.

D. ARGUMENT

DEPUTY MESSINEO'S BREAKING DOWN THE DOOR OF THE PADLOCKED SHED WITHOUT A WARRANT WAS AN UNLAWFUL SEARCH, THERE WAS NO "EMERGENCY," OR "EXIGENCY," DEPUTIES USED THE CLAIMED "EMERGENCY/EXIGENCY" EXCEPTIONS AS A PRETEXT TO INVESTIGATE A CRIME AND TO UNLAWFULLY GATHER EVIDENCE TO APPLY FOR A SEARCH WARRANT, AND DEPUTIES EXCEEDED THE SCOPE OF THE CURTILAGE.

Warrantless searches are per se unreasonable under both Article 1, § 7 of the Washington Constitution, as well as under the Fourth Amendment to the United States Constitution. State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). The validity of a warrantless search is viewed *de novo*. State v. Kypreos, 110 Wn.App. 612, 616, 39 P.3d 371 (2002) (citing United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996)). A trial court's determination on a motion to suppress is reviewed for substantial evidence and to see if the findings support the conclusions of law. State v. Schlieker, 115 Wn.App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is "a sufficient quantity of evidence in the record 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*. State v. Mendez, 137 Wn.2d 208, 212, 970 P.2d 722 (1999),.

The courts of this state will suppress the evidence seized as a fruit of an illegal, warrantless search unless the State meets its burden of proving that the search falls under a "jealously and carefully drawn" exceptions to the warrant requirement. State v. Ferguson, ___ Wn.App. ___, 128 P.3d 1271, 1275 (2006), citing State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). Furthermore, if information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information may not be used to support the warrant. State v. Ross, 141 Wn.2d. 302, 304, 4 P.3d 130 (2000) (citing State v. Johnson, 75 Wn.App. 692, 879 P.2d 984 (1994)). The burden is always on the State to prove one of the narrow exceptions to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

One of the "jealously and carefully drawn" exceptions to the warrant requirement is known as the "emergency" exception. State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). Under the "emergency" exception to the warrant requirement, a police officer may conduct a warrantless search when premises "contain persons in imminent danger of death or harm," when premises contain "objects likely to burn, explode or otherwise cause harm," or when the entry will "disclose the location of a

threatened victim." Utter J. Survey of Washington Search and Seizure Law: 1988 update, 11 U. Puget Sound L. Rev. 421, 538-59 (1988); see also, 2 W. LaFare, *Search and Seizure*, § 5.4(c) (2d. ed. 1987). To justify a warrantless search under the emergency exception, the State bears the burden of providing both subjective good faith, as well as objective reasonableness. State v. Loewen, 97 Wn.2d 562, 647, P.2d 489 (1982). The reasonableness of a search will be determined at the moment of its inception. A search which is not reasonable at its inception will not be validated if it uncovers incriminating evidence. State v. Grundy, 25 Wn.App. 411, 607 P.2d 1235 (1980).

In State v. Gocken, 71 Wn.App. 267, 857 P.2d 1074 (1992), the Court set out the requirements for the emergency exception to the warrant requirement as follows:

Thus, as in the case of the emergency exception, the State can demonstrate that an officer's warrantless entry is not merely a pretext to search for otherwise unavailable evidence by proving that: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Gocken, 71 Wn.App. at 276-77. The emergency exception to the warrant requirement allows police to conduct noncriminal investigations if necessary to provide emergency aid or to make routine checks on health

and safety. State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). Put another way, "[t]here is no warrant exception based solely on the need to investigate a crime scene" as part of the emergency exception or any other exception to the warrant requirement. State v. Warfield, 119 Wn.App. 871, 80 P.3d 625 (2003) (emphasis added); State v. Lund, 54 Wn.App. 18, 771 P.2d 770 (1989) (emergency must be real and not just a pretext for conducting an evidentiary search); State v. Schlieker, 115 Wn.App. 264, 62 P.3d 520 (2003) (Reversing the trial court's ruling that the "emergency exception" to the warrant requirement justified the warrantless search, ruling that "there is substantial evidence that the claimed emergency was a mere pretext for an evidentiary search).

Again, "[t]he emergency exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property.' When the State invokes the emergency exception, 'we must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search.'" State v. Schlieker, 115 Wn.App. at 270 (internal citations omitted).

Most importantly, involvement under the community caretaking function is "'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." State v. Houser, 95 Wn.2d 143, 151, 622 P.2d 1218 (1980)(quoting Cady

v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)

(emphasis added)). Furthermore:

In a caretaking situation, the admissibility of the evidence discovered depends on a "balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform" the community caretaking function. When weighing these interests, "the balance ought to be struck on the side of privacy."

Schlieker, 115 Wn.App. at 271 (emphasis added), quoting State v. Kinzy, 141 Wn.2d at 387, 392 (other citations omitted).

1. There was no evidence of an emergency or exigent circumstances in this case and deputies had ample time and resources to apply for a warrant before breaking down the door of the shed.

The reasoning of the Schlieker case should be applied to the present case and the trial court's ruling authorizing the deputies' initial, warrantless, pre-textual, breach of the shed should be reversed, and all evidence gained as the fruits of that unlawful search should be suppressed.

By their own words in the present case, it is clear that deputies went to the property of Ms. Flowers "investigating . . . for a possible meth lab." 3.5/3.6 RP 66, 68, 94, 120. Deputies were alerted to Ms. Flowers' property via a 911 call that originally came in as "anonymous." Id. at 19, 45. According to the report of the 911 call, the caller had smelled a strong chemical odor coming from a shed located on the property next to his, and

that he had seen a burner and a "red glow" coming from the shed. 3.5/3.5 RP 19, 45, 65, 100. Deputy Johanson admitted that they were looking for a shed when they got to Ms. Flowers' property because of the information contained in the 911 call. 3.5/3.6 RP 70. Indeed, from the information stated in the CAD log² of the 911 call deputies certainly had pre-existing knowledge of the location of possible items sufficiently in advance to permit them to apply for a warrant before they breached the shed. United States v. Davis, 461 F.2d 1026 (3rd Cir. 1972); United States v. Bolts, 558 F.2d 316 (5th Cir. 1977).

Significantly, when deputies arrived at the property they did not go to the front entrance of the residence, but instead headed over towards the shed where they had seen Mr. Vella "jiggling" the lock on the shed. 3.5/3.6 RP 53. Deputy Johanson then encountered Ms. Flowers walking up from her relative's residence. Id. at 56. Deputy Johanson then proceeded to walk around the property with Ms. Flowers, but did not at any time ask her permission to enter any of the structures on the property. 3.5/3.6 RP. When told that deputies had been called because of a suspected meth lab located on the property, Ms. Flowers said there was not a meth lab on the property. Id. 57.

² The CAD log was marked as Plaintiff's Exhibit No. 4 and was admitted at the 3.5/3.6 hearing.

The 911 call originally came in at about 1716 hours. 3.5/3.6 RP 19. Deputies Johanson and Smith first arrived at Ms. Flowers' property at about 1819 hours. Id. RP 52. A meth lab team member was dispatched to the scene at about 1907 hours. 3.5/3.6 RP 136, 157. The shed was broken into at about 2021 hours. 3.5/3.6 RP 196. Deputy Messineo said that when he got to the scene he was briefed by other offers, and admitted that he went right to the shed, where he smelled what he suspected was anhydrous ammonia. Id. at 158. Deputy Messineo said he did not smell anything until he got to the shed. Id. Deputy Messineo noted that the shed had been locked from the outside and he also saw an exhaust tube in the eaves of the front of the shed, and an exhaust fan at the back of the shed. 3.5/3.6 RP 159. All of the deputies on the scene agreed that before the shed was breached there was no indication that there was anyone in need of medical aid, no one was armed or dangerous, no one had been arguing or fighting and there had been no "felon in flight." 3.5/3.6 RP 70, 71, 104, 144, 145. Deputies also admitted that there were no sounds coming from inside the shed, nor was there any light coming from the shed that was visible from the outside. Id. at 74, 196.

Deputy Messineo had been told by Ms. Flowers that the house on the property was her residence. 3.5/3.6 RP 214. Deputy Messineo

admitted that he was familiar with the "knock and talk"/ Ferrier warnings, but that he did not follow that procedure in this case. 3.5/3.6 RP 200, 215.

There was no reason that deputies in this case could not have applied for a warrant before breaking into the shed. They were on the scene for at least two hours before breaching the shed. More to the point, they had their own warrant writer present right at the scene³, Deputy Gosling, who had arrived at about 1900 hours. However, the search warrant was not applied for until the next day--well after the initial, warrantless breach of the shed circled in red. 3.5/3.6 RP 191, 224, 255.

2. The deputies' actions in breaking into the shed were a mere pretext to gather evidence for a search warrant as shown, in part, by their treatment of Mr. Cornell when, under cover of gunpoint, they dragged Mr. Cornell out of the shed, took him to the ground, and handcuffed him.

In the Schlieker case, the Court found the actions of the officers once they found the defendant inside the building critical to its ruling that their warrantless search under the guise of the community caretaking exception was really done so they could perform an actual search for evidence. The deputies' actions towards Mr. Cornell after they broke down the shed door are the same as the actions of the officers in Schlieker:

The deputies' actions and that they did not inquire into the occupants safety, but instead handcuffed and arrested them,

³ It is quite telling that in the court's findings as to Deputy Gosling's qualifications, the fact that one of his duties is to be the "warrant writer for the team" is omitted from the findings.

convince us that this was not a circumstance wherein the deputies were attempting to help people who were injured or in danger. the entry was a not so subtle intrusion into the appellants' privacy, rationalized with the "community caretaking" function so that the deputies could perform a search.

Schlieker 115 Wn.App. at 272 (emphasis added).

The facts of the Schlieker case as to the actions of the officers upon seeing the defendant there are strikingly similar to what deputies did in the present case once they broke open the door to the shed and saw Mr. Cornell. Here, as in Schlieker, deputies did not enquire as to Mr. Cornell's wellbeing, nor did they administer medical aid or call an ambulance. 3.5/3.6 RP 196. Instead, Deputy Messineo broke down the locked-from-the-outside door with an axe, with at least one other officer having his weapon drawn, and once the door was breached they forcefully grabbed Mr. Cornell, dragged him out of the shed, took him to the ground and handcuffed him. Id. RP 98, 112, 133, 134, 228, 229. These actions by deputies are not those of someone being concerned with the wellbeing of the occupant of the shed. Although the fire department did perform a wet decontamination on Mr. Cornell, Cornell was not taken to the hospital, he was taken to jail. 3.5/3.6 RP 98.

These facts show that there was no indication that there was a medical emergency or other exigency which would negate the requirement of a warrant prior to the breach of the shed. A search which is not

reasonable at its inception will not be validated if it uncovers incriminating evidence. State v. Grundy, 25 Wn.App. 411, 607 P.2d 1235 (1980). Deputies had been on the property for several hours, there was no evidence that anyone was in danger, and they also had a "warrant writer" right there with them on the scene. 3.5/3.6 RP 191, 224. The deputies here certainly could have kept the area under surveillance until a warrant was obtained. State v. Werth, 18 Wn.App. 530 (1977). Thus, deputies had plenty of time and the resources (their "warrant writer" was right there on the scene with them) in this case to at least apply for a telephonic warrant. But a warrant was not applied for until after the breach of the shed, which was unlawful, since Deputy Messineo admitted he could see everything inside the shed from the doorway at the time of the breach of the door. 3.5/3.6 RP184. The bottom line here is that the deputies in this case were on a mission to search for evidence and to take whoever was in the shed into custody--which is exactly what they did. The deputies' forced entry into the shed "was a not so subtle intrusion into [Ms. Flowers'] . . . privacy rationalized with the community caretaking function so that the deputies could perform a search." Schlieker, 115 Wn.App. at 272.

3. Deputies violated the curtilage rule by straying from the ordinary path to Ms. Flowers' residence and by walking behind the house and over to and around the shed looking for incriminating evidence.

There are limitations as to where officers may lawfully go when entering a private citizen's property. For example, "[t]he curtilage of a home is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000) (citing State v. Ridgway, 57 Wn.App. 915, 918, 790 P.2d 1263 (1990)). Residents "maintain an expectation of privacy in the curtilage, or area contiguous with a home." State v. Poling, 128 Wn.App. 659, 667, 116 P.3d 1054 (2005). But, [p]olice officers on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access route to a house or a walkway leading to a residence." State v. Smith, 113 Wn.App. 846, 852, 55 P.3d 686 (2002), citing State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). However, police entering such areas must also "do so as would a 'reasonably respectful citizen.'" State v. Poling, 128 Wn.App. at 667, quoting State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). "A substantial or unreasonable departure from the area exceeds the scope of the invitation and violates an individual's constitutionally-protected expectation of privacy." Id.

Deputies in the present case exceeded the scope of the curtilage rule when they walked all around Ms. Flowers' property, first focusing directly on the shed, traversing to the back of the residence and around the back of the shed, rather than staying within the pathway to the residence. Deputy Smith said that he went to the "fire pit, shed. [sic] I actually came around the south side and went around the southwest side and made a loop in between the shed and the fire pit." 3.5/3.6 RP 107. A "reasonably respectful citizen" would not go beyond a driveway and porch or entrance to a home without feeling he or she was invading the privacy of the individual's property. Because the deputies here made "a substantial departure from the area," Ms. Flowers' expectation of privacy was violated and this Court should find that the deputies' straying into the areas of the shed and behind the house was improper.

4.. Deputies should have given Ms. Flowers' the Ferrier warnings before forcing entry into the shed where Mr. Cornell was found.

When police officers are conducting a "knock and talk" investigation on private property, they must give the so-called Ferrier warnings. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). The Ferrier Court explained these warnings as follows:

When police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior

to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering . . . vitiates any consent given thereafter.

State v. Ferrier, 136 Wn.2d at 118, 119.

Deputy Johanson said that he went to Ms. Flowers' property "on a knock and talk." 3.5/3.6 RP 68. The trial court found that Ms. Flowers had standing to challenge the curtilage of the residence. CP 47. The shed circled in red was part of the curtilage of Ms. Flowers' property. Because the curtilage is protected under the same umbrella of protection as the house, the Ferrier warnings were required here, but were not given. Quite simply, proper consent should have been obtained prior to the deputies walking around the curtilage and investigating and ultimately breaking into the shed where Mr. Cornell was found. See Ferrier and Ross, Supra. But Deputy Johanson and Deputy Messineo both said they did not ask Ms. Flowers for consent to search her property, nor did they give her the Ferrier warnings. 3.5/3.6 RP 68, 200, 215. And, the trial court obviously saw the need for Ferrier warnings because it found the initial search of Ms. Flowers' house and the shed in back of the house improper, in part because deputies did not administer the Ferrier warnings. CP 47. Conveniently, no evidence was discovered during those initial warrantless searches.

Since the trial court found that deputies should have administered Ferrier warnings to Ms. Flowers before searching her residence and the shed behind the house, then most certainly deputies should have given Ms. Flowers the Ferrier warnings before breaking into the shed where Mr. Cornell was found. It is quite simply undisputed that no Ferrier warnings were given at any point in this case. 3.5/3.6 RP 68, 200, 215.

Because Ms. Flowers was never given the Ferrier warnings before Deputies broke into the shed on her property, all evidence and information gained from the breach of that shed should be suppressed.

E. CONCLUSION

Deputies in this case went to Ms. Flowers' property on a "knock and talk" to investigate an anonymous tip that there was a meth lab in one of the sheds. No Ferrier warnings were ever given. Deputies also had no knowledge that anyone was in the shed, nor did they have any information that there was a medical emergency or any other type of exigency which would negate the requirement of a search warrant. Deputies were on Ms. Flowers' property for several hours investigating, had a "warrant writer" with them, and had plenty of time to apply for a search warrant. Deputies also strayed from the ordinary pathway of the curtilage when investigating the property. Once the deputies broke into the padlocked shed and found Mr. Cornell inside, they took him to the ground at gunpoint, read him his

rights, and arrested him. Mr. Cornell was taken to jail, not the hospital. Evidence seen after the warrantless breaching of the shed door was then used to obtain a search warrant.

For the foregoing reasons this Court should find that the warrantless breach of the shed was unlawful and all evidence gained from that search should be suppressed as fruit of the poisonous tree.

Accordingly, this matter should be remanded with instructions to reverse the trial court's suppression ruling, and to vacate Ms. Flowers' conviction.

RESPECTFULLY SUBMITTED THIS 17th day of April, 2006.

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COURT OF APPEALS

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

BRITNEY KAYE FLOWERS,
Appellant.

33815-7
NO. ~~33852-1-H~~

CERTIFICATE OF MAILING

CERIFICATE OF MAILING

I hereby certify, under penalty of perjury under the laws of the state Washington that on April 17, 2006, I mailed a copy of the Appellant's Opening Brief via first class US mail, postage prepaid and properly addressed to:

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