

APPEALS
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BY

NO. 33876-9-II
Cowlitz County Cause No. 04-1-01522-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

v

TIMOTHY HADDON
Appellant

BRIEF OF APPELLANT

JAMES K. MORGAN
Attorney at Law
1555 Third Avenue, Suite A
Longview, WA 98632
(360)425-3091

AM 6/18/06

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ASSIGNMENT OF ERROR

Appellant assigns as error the decision of the trial court denying Haddon's motion to suppress evidence obtained at Haddon's residence in violation of the Fourth Amendment to the United States Constitution and Article One, Section Seven of the Washington States Constitution.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. On September 8, 2004, Detective Paul Berger of the Idaho State Police Investigations Division, Special Agent Douglas Nelson of the Internal Revenue Service Criminal Investigation Division, and Deputy Charles Christensen of the Clark-Skamania Drug Task Force went to Haddon's residence located at 115 Lariat Road in Amboy, Cowlitz County Washington. A week or two earlier, Berger and Nelson had contacted Christensen to request that he assist them by taking them to Haddon's residence; their purpose in contacting Haddon at his residence was to serve him with a federal subpoena in a federal proceeding involving Haddon's brother in Idaho. They also intended to question Haddon about any involvement he might have in his brother's illegal activities, involving trafficking in marijuana and money laundering schemes. When they arrived in the area, Christensen escorted them to Haddon's residence, which was a double-wide mobile home situated in a remote area, in the middle of a field. When they arrived, Berger and Nelson approached the front of the residence, while Christensen walked around to the back of the residence. As

they approached the residence, both Berger and Nelson noticed an odor of growing marijuana; they quickly conferred and decided to proceed with their interrogation of Haddon as they had planned, and then inquire about the odor of marijuana emanating from the residence. When Haddon answered the door, Berger informed him of the subpoena and asked to come in to ask Haddon some questions. He was told that he could talk to them at his residence, or he could go downtown with them. Since he didn't want to be arrested he allowed them in, and Christensen, after circling the residence, also followed them in. Inside, there was another quick conference between Berger and Christensen regarding the odor of growing marijuana inside the residence and it was decided to pursue that matter once Haddon was interrogated about any involvement in his brother's criminal activities. Two of the officers sat at a dining table with the other officer standing behind them, and the defendant sitting across the table; it was a small confined area and the defendant had his back up against a window. They interrogated him for about thirty minutes, controlling his movements, concerning whether he had assisted his brother with money laundering, or whether he or his brother had supplied each other with marijuana. They then confronted him with the odor of growing marijuana that they had noticed, asking him how many plants he had; he was told that if they had to get a warrant, he was going to go to jail. Christensen later testified that they were trying to avoid the necessity of getting a warrant, since that would have taken at least another three hours. Haddon agreed that they could

search his residence without a warrant, to avoid going to jail. The officers contacted the Cowlitz County Sheriff's Office which dispatched Deputy Robert Brewer and Troy Brightbill to Haddon's residence. They arrived about a hour later, during which time the officers continued to sit around the table, controlling Haddon's movements, as well as the movements of his wife, who arrived about twenty minutes before Brewer and Brightbill. It was not until they arrived, and were ushered into the house by Christensen, that Haddon and his wife were advised of their Miranda warnings and their Ferrier warnings. They consented to a search of the residence, and the officers found six growing marijuana plants as well as some processed marijuana. At the conclusion of the Suppression Hearing, the court indicted it was inclined to believe Haddon, and considered his account of the events to be reliable, but considered the search of the premises to be sufficiently attenuated from any initial illegality of the officers in gaining access into the residence. Did the trial court err in denying Haddon's Motion for Suppression of Evidence based on the officer's failure to advise Haddon of his Ferrier warnings at the threshold of his residence, since one of their reasons in seeking entrance was to investigate the presence of a marijuana grow operation inside the residence?

2. Based upon the above fact pattern, even if Ferrier warnings were not required, should not the Suppression Motion have been granted since Haddon's consent was clearly involuntary, in view of the totality of all of the circumstances?

STATEMENT OF THE CASE

On February 18, 2005, Timothy Haddon through his counsel filed a Motion for Suppression of Evidence (CP 5). This motion was supported by a Memorandum of Authorities in support of Haddon's contention that the observations of the police were made outside the curtilage impliedly open to the public should be suppressed, that the police obtained entry into the home and obtained consent to search without providing Ferrier Warnings to Haddon and that Haddon's consent to the search was coerced and involuntary in view of the totality of the circumstances. (CP 6). An evidentiary hearing on the suppression motion was commenced on July 14, 2005 in Cowlitz County Superior Court, and at that time the state began by calling Detective Paul Berger, a detective with the Idaho State Police Investigations Division as the state's first witness (RP 4, 5). After asking the witness about his training and experience (RP 4, 5, 6), the prosecutor directed the witness' attention to the events that occurred on September 8, 2004 at the residence of the defendant, Timothy Haddon, located at 115 Lariat Road in Amboy, Cowlitz County, Washington. (RP 7, Lines 8-13). He indicated that he went to that location accompanied by Special Agent Doug Nelson of the Internal Revenue Service as well as Chuck Christensen from the Clark-Skamania Drug Task Force, for the purpose of serving a Grand Jury subpoena on Timothy Haddon, as well as to interview him in regard to his brother's activities on a money laundering case (RP 7, Lines 14-25). He testified that Mr.

Haddon lived in a remote area and that in pulling into the driveway on the property, Haddon's residence, which was a trailer, sat in the middle of a field; there was no garage, and the driveway was not paved (RP 9). He was shown a photograph depicting the front portion of the residence, which was admitted (RP 10). Berger testified that he and Christensen stood back and Agent Nelson walked up to the door on the right side of the front of the house and began knocking on the door. Berger testified that from his vantage point about 10 to 15 feet away, he could smell the odor that he associated with growing marijuana coming from that area (RP 11). He then testified that he and Nelson went up to the outer door of the residence about 10 to 15 feet to the left of the other door and Berger knocked on that door (RP 12). He indicated that just before he got to the door, he could hear the humming of a ballast and the odor of marijuana got stronger (RP 13, Lines 3-9). He testified that the area in the front of the residence was a grassy area (RP 13, Lines 10-13). He testified that when he knocked on the door, Tim Haddon came to the door. Berger testified that he identified himself as an Idaho State Police Detective, asked if he could come in to talk and Haddon let him into the house. (RP 14, Lines 5-19). He denied threatening Haddon or telling him that he was going to take him into custody if he did not let him into the residence. (RP 15, Lines 1-6). He testified that once inside they walked through what was like a laundry room area, past a closed door to the right, where the officer could hear fans and ballasts, and a strong odor of marijuana (RP 15, Lines 9-13). They proceeded into the living room

area near a back slider area where Deputy Christensen was knocking on the back slider (RP 15, Lines 14-16). Berger recalled that Haddon opened the window and talked to Christensen, but he could not hear what was said. (RP 15, Lines 19-22). When he walked into the living room, there were some chairs by the slider window and a baggie of marijuana sitting on top of a stand between the two chairs in plain view (RP 16, Lines 8-12). Berger did not bring any of his observations to the attention of Mr. Haddon. (RP 16, Lines 13-16). Berger indicated that he did not place Haddon under arrest based on his observations of marijuana and the odor of marijuana. (RP 16, Lines 23-25, RP 17, Line 1). He testified that they walked to a dining room table where an interview of Mr. Haddon was conducted; however, he did not advise Haddon of his Miranda warnings because "he wasn't under arrest and I wasn't there for any criminal cases." (RP 17, Lines 5-17). The interview, which was attended by Deputy Christensen and Agent Nelson, lasted about 30 minutes; it involved a discussion of Mr. Haddon's brother and Berger described Haddon as very cooperative (RP 17, Lines 13-25). Berger testified that during the interview, he remembered on one occasion Haddon said that he had a dry mouth and "so we let him get a drink of water". (RP 18, Lines 6-10). Berger testified that they served Haddon with the Grand Jury subpoena at the very beginning. (RP 19, Lines 1-3). After they concluded the interview, Berger testified that Christensen asked Haddon if he had any medical marijuana and that Haddon said yes. They talked to him about marijuana growing and Haddon agreed

that he had a marijuana grow "and then we talked about what we were going to do from that point on". (RP 19, Lines 7-15). Berger testified that at that point Haddon was not under arrest and he was not read his Miranda warnings. Christensen called the Cowlitz County Deputies to come to the residence. (RP 19, Lines 16-25). He testified that while they were talking to the Cowlitz County Deputies, Christensen mentioned that they were going to need a warrant for the residence, and Haddon told them that they didn't need a warrant, that he would cooperate. Berger testified that it was about 45 minutes to an hour before Deputy Brewer and Deputy Brightbill of the Cowlitz County Sheriff's Department arrived at the residence (RP 20, Lines 9-19). He testified that when Deputy Brewer arrived he advised Mr. Haddon of his Miranda warnings. (RP 20, Lines 23-25). He was also present when Deputy Brewer read Mr. Haddon a permission to search form. This was also read to Haddon's wife, who had arrived prior to the arrival of the Cowlitz County Deputies. Berger testified that he was present when the defendant and his wife both gave permission to the deputies to search. (RP 21, Lines 3-11).

On cross-examination, Berger testified that he was not aware of any attempts by law enforcement to contact or interview Haddon before traveling from Idaho to Amboy, Washington. (RP 23, Lines 1-14). He indicated that he was at the residence of Mr. Haddon for about an hour and one half, but the interview lasted about a half hour; the questions involved emails sent to Mr. Haddon by his brother concerning the issue of money laundering. (RP 24,

Lines 5-25). Berger acknowledged asking Haddon about an email that he had received from his brother pertaining to legalizing \$250,000 his brother had just found. (RP 26, Lines 15-20). He did talk to Haddon about any assistance that he might have provided his brother about legalizing those funds. (RP 27, Lines 14-25). Berger indicated that if Haddon had acknowledged providing some assistance to his brother in regard to money laundering, he would not have charged him with an offense, but possibly his companion would have. (RP 28, Lines 5-14). In regard to the physical layout of the property, Berger indicated that he didn't believe there were any paths around either side of Haddon's house; all he could remember was basically a field and did not remember any paths. (RP 28, Lines 17-24). He also testified to the interior layout of the residence, bedroom, laundry room, the closed room, the kitchen, dining area. (RP 29, Lines 1-19). Berger testified that there were two doors on the side of the house facing the driveway, and he drew a diagram of the layout. (RP 30). He testified that Nelson was at the door on the right side of the front of the house and he went to the other door on that side of the house. (RP 33, Lines 1-9). It was after he gained entry into the house that he saw Deputy Christensen through a window, knocking on the backdoor of the residence. Berger testified that he did not recall telling Haddon about the subpoena at the door, but discussed it between the time of going to the door and through the residence. (RP 37, Lines 1-15). He testified that shortly after he saw Deputy Christensen, he advised him that he had seen marijuana by the chair and they both

talked about the odor of growing marijuana in the residence. (RP 37, Lines 16-25, RP 38, Lines 1-4). This conference between Berger and Christensen occurred within the first five minutes that they were at the house, but Berger said they didn't have a plan except to talk to him about his brother and then deal with the marijuana (RP 38, Lines 16-24). During the interview at the kitchen table, the defendant was on one side of the table up against the window, and Berger and Nelson sat on the other side of the table, with Christensen standing behind them. Both Berger and Nelson conducted the interview of Mr. Haddon. (RP 30, Lines 8-23). When asked if they would have allowed Haddon to go into his bedroom for a few minutes by himself, Berger indicated that they probably would have talked to Haddon about the marijuana grow at that point, but the subject did not come up. (RP 40, Lines 18-23). When Berger was asked if they were waiting to bring up the marijuana until the point when they were going to assert control over Mr. Haddon, he indicated that was fair to say. (RP 40, Lines 24-25, RP 41, Lines 1-2). He indicated that the baggie of marijuana that he had observed contained a small amount of marijuana, obviously a personal use amount. (RP 41, Lines 3-7). Berger testified that he recalled broaching the subject of marijuana with Haddon, since his brother's case involved marijuana; he asked Haddon if his brother had ever given him marijuana and also asked Haddon if he had ever given his brother marijuana. It was after that that they asked about medicinal marijuana. (RP 42, Lines 4-14). He acknowledged the conversation that he had with Haddon not

only involved laundering money but also marijuana, involving questions about Haddon ever providing to or receiving marijuana from his brother. (RP 43). In regard to the issue of legalizing the \$250,000, Berger also recalled asking Haddon if he was involved in stock trading, a follow up question in regard to legalizing funds. (RP 44, Lines 3-19). He testified that when Christensen asked Haddon about medical marijuana the officers advised Haddon that they knew he had a marijuana grow in his house, and Haddon agreed. (RP 46, Lines 7-13). They were pretty sure they knew where it was due to the sound of the ballast and fans and a real strong odor coming from the closed room. (RP 47, Lines 7-14). He testified that before Deputy Brewer's arrival, he was not aware of anyone informing Haddon that he did not have to consent to the officers coming in and searching for marijuana or that he could rescind that consent at any time. (RP 48, Lines 11-25, RP 49, Lines 1-5). He testified that it was about an hour between the time they had the discussion about the marijuana and the arrival of Deputy Brewer and that during that time the defendant was made aware that the defendant wasn't going anywhere without the permission of the police and that if he went to the kitchen, they followed him. (RP 49, Lines 6-21). He testified that no one went into the grow room until Deputies Brewer and Brightbill arrived, but it was pursuant to their questioning of Haddon about growing marijuana that he had indicated that there was marijuana growing in that particular room. (RP 50, Lines 19-25, RP 51, Lines 1-2).

Douglas Nelson Special Agent for the IRS, Criminal Investigation Division was then called to testify by the state. He indicated that he had been assigned to a drug enforcement task force for about a year. (RP 53). He also testified that the purpose of the officers in going to 115 Lariat Road in Amboy, Washington was to serve a Federal Grand Jury subpoena on Mr. Haddon and to interview him in regard to money laundering charges regarding his brother. (RP 54, Lines 16-20). He testified that the residence was in a rural area, not many homes in the area, and the driveway to the residence "kind of ended into an open field". (RP 55, Lines 19-24). He testified that when he walked up to the right front door of the residence, he could smell a strong odor of growing marijuana (RP 57, Lines 6-20). He signaled to Berger what he had observed and Berger also signaled that he noticed the same smell as well. (RP 58, Lines 1-4). He indicated that Berger went to the door on the left and eventually the door opened, Berger went inside and he quickly followed behind him. (RP 58, Lines 15-25). He made the same observations inside the home as did Berger (RP 59). He indicated that in regard to the issue of marijuana, Berger and Christensen took the lead in asking those questions. (RP 63, Lines 5-14).

On cross-examination, he testified that before he and Berger gained entrance to the house, the plan was to first address the issue regarding Mr. Haddon's brother before bringing up the issue of the marijuana that they had detected. (RP 68, Lines 11-20). When Mr. Haddon responded to the door where Berger was

standing, Nelson was still standing at the other door, and could not hear what was said between them. (RP 69, Lines 3-12). He testified that he approached Berger when Berger signaled to him that the door was open. (RP 69, Lines 21-24). He remembered Berger telling Haddon that they wanted to interview him in regard to a subpoena and that they needed Haddon to come to Idaho. (RP 70, Lines 5-25). He also remembered Berger telling Haddon that Berger needed to come in to talk to Haddon about his brother; nobody informed Haddon that he had a right not to let them in. (RP 71, Lines 1-11). He could not recall whether Berger had told Haddon that if Haddon didn't agree to them going inside the house to talk that Haddon would have to come outside to talk to the police. (RP 71, Lines 12-18). He recalled a short conversation among the three officers when the defendant got up to get a drink of water, that they were going to talk about his brother first before they brought up the marijuana. (RP 73, Lines 1-9). Nelson also indicated that one of the reasons they were meeting with Haddon was to find out if he had given his brother any assistance in regard to money laundering. (RP 74, Lines 16-20). Haddon was also asked about his investment activities, as it may have pertained to his brother's activities (RP 75, Lines 1-3). They were inquiring about his brother Ray sending Haddon any ill-gotten gains for purposes of investment. (RP 75, Lines 4-10). When asked if Haddon had responded affirmatively, that would subject him to criminal liability, Agent Nelson indicated that would be up to the United States Attorney. (RP 75, Lines 11-17). He testified that

when the defendant asked to get a glass of water they let him do it, but the area was very small and there was a good line of sight from the dinning area to the kitchen. (RP 76, Lines 1-14). Agent Nelson also confirmed that the defendant was asked if his brother Ray had ever given him any marijuana, since that was the illicit nature of the money that was being looked at, and whether he had ever provided marijuana to Ray Haddon. He acknowledged that the purpose in going to the residence was to get information about illegal activity, not only money laundering, but finances that had been derived from trafficking in marijuana involving his brother, and whether Haddon had any involvement in trafficking marijuana. (RP 78-79). Nelson confirmed that when Haddon was asked if he had ever provided marijuana to his brother and he indicated that he had the last time his brother visited, the officers used that as a jumping off point to ask about the growing marijuana. (RP 79, Lines 14-20). Nelson could not recall whether Christensen had told Haddon that if he denied there was growing marijuana they would go get a warrant and he would go to jail; he also could not remember whether Haddon had been told it would be better for him if he didn't make them get a search warrant. (RP 80, RP 81, Lines 1-2). He also indicated that during the contact with the defendant they were all within three to four feet from each other, and that until Deputy Brewer arrived no one advised him of his Miranda rights. (RP 82). Nelson confirmed that Christensen made a statement about applying for a warrant, that was a response to Haddon inquiring

what would happen if he said that he didn't have any marijuana. (RP 86, Lines 6-13).

The hearing resumed on July 21, 2005, at which time the state called Deputy Charles Christensen to testify on behalf of the state; he described his training and experience in law enforcement and that he was assigned to the Clark-Skamania Drug Task Force. (RP 5). He testified that when he went to the residence at 115 Lariat Road, he was accompanying the other detectives who had a subpoena for Mr. Haddon and wanted to interview him regarding some money laundering charges; the other detectives had contacted Christensen because there was another case in Clark County that he was indirectly involved through his brother, and so they had called the Clark-Skamania detectives. He testified that the officers had made arrangements to meet him within a week and so he went ahead and elected to take them up to Haddon's residence. (RP 10, Lines 20-25, RP 11, Lines 1-8). He testified that when they arrived, he walked around the house he could smell fresh cut or growing marijuana at the north end; after he entered, he and Berger said to each other that it smelled like a grow. (RP 9, Lines 9-25). He indicated that in the course of the interview with Haddon, he was asked if he had given his brother any marijuana and when he indicated he had, Christensen indicated that he must have acquired it and then indicated that he suspected a marijuana grow in Haddon's house. (RP 12, Lines 16-21). In response to this question, Haddon admitted that there was one, that it was a medical marijuana-type situation but that he did not have a medical

marijuana card. (RP 12, Lines 22-25, RP 13). At this point, Christensen testified that Haddon was not placed under arrest, nor was he provided with Miranda warnings, but that when the prosecutor asked him if Haddon was free to move or restrained, Christensen was positive that Haddon was informed that if you are going somewhere within the house you are going to be followed. (RP 13, Lines 21-25, RP 14). Christensen recalled telling Haddon that the best thing would be to cooperate. (RP 14, Lines 9-10). After he contacted the Cowlitz County Sheriff's Office, they all sat at the same table for about one hour. (RP 14, Lines 24-25, RP 15, Lines 1-5).

On cross-examination, Christensen acknowledged that he understood a week or two before the officers arrived that he was going to be taking them to Mr. Haddon's residence for the purpose of issuing he and his wife a subpoena and interviewing them. (RP 17, Lines 10-22). He testified that he would have to say that he knew or suspected that they were going to talk to Haddon about his knowledge of his brother's activities. (RP 19, Lines 5-7). He acknowledged that he walked around the house, but that there were no paths around that house or sidewalks, and that the house sits right in the middle of a field with grass growing right up to the foundation. (RP 19, Lines 13-24). He made a circuit of the house when he got around to the front of the house he noticed that Berger and Nelson were already inside, so he went inside as well. (RP 20, Lines 12-21). When he entered he had a brief exchange with Berger concerning their recognition that there was a marijuana

grow in the house at that time. (RP 20, Lines 22-25, RP 21, Lines 1-4). He also recalled that they were seated at the table, the defendant got up to get a glass of water in the kitchen and he was followed by Christensen, which Christensen described as an officer safety issue. (RP 23, Lines 1-8). Christensen testified that when he told Haddon that they suspected a grow in his house, that he could smell it, he could not recall exactly what Haddon said in response. (RP 24, Lines 3-12). He told Haddon that things would go easier with him if he cooperated. (RP 24, Lines 16-19). He acknowledged that he had the option of contacting Cowlitz County and requesting a warrant. (RP 25, Lines 16-21). When Christensen was asked when he told Haddon that things would go easier for him his purpose was to encourage Haddon to confess to possessing or growing marijuana, Christensen responded "not to acknowledge guilt, but generally when it goes easier for them, it goes easier for me, too." (RP 26, Lines 20-25, RP 27, Line 1). On re-direct, the prosecutor asked Christensen if there was any particular reason he chose not to pursue the course of obtaining a warrant; Christensen indicated that he would have had to meet with Cowlitz County Deputies, provide probable cause, the Cowlitz County Deputy would have to write out an affidavit, have Christensen sign it and "we were looking at probably a couple, three hours, minimum." (RP 27, Lines 20-25).

The next witness for the state was Deputy Robert Brewer, who also testified regarding his experience and training in law enforcement. (RP 28, 29). He testified that when he arrived at the

residence he met Deputy Christensen in the front yard, that they had discovered a grow, they hadn't been back in the room yet, and then Brewer followed him inside the residence where he was introduced to the State Policeman, the Treasury Agent, and then to Mr. Haddon and his wife. (RP 31, Lines 3-16). He advised Haddon and his wife of their Constitutional Rights and then advised them of the consent to search. (RP 31, Line 25, RP 32, Line 1). He read the consent to search in open court. (RP 33, Lines 7-14). After they signed the consent to search form, Haddon took them to a little room off his laundry room and showed the officers his grow operation. (RP 33, Lines 20-24). Deputy Brightbill also testified, and he indicated that after the consent form was signed, he asked Haddon if he would show Brightbill around the residence and he did so. (RP 41, Lines 8-10).

The defendant Timothy Haddon then testified on his own behalf regarding the events of September 8, 2004. He had no prior notice that the police were intending to contact him at his residence. (RP 43). He indicated they arrived about 12:25 p.m. He testified regarding a number of photographs of his residence and the surrounding area; he testified that the only difference was that on September 8 the grass had not been mowed for the entire year. (RP 45 and 46). He also described the interior layout of his home, drawing diagrams for that purpose. (RP 48, 49). He became aware that people were knocking on both of the doors on the west, or front side of his residence, and then later noticed someone knocking on the sliding glass doors on the east side of

the residence, who was later determined to be Deputy Christensen. (RP 52, RP 53, Lines 1-2). He indicated that he responded to the laundry room door, which was looking at the west side of his home from the outside, the door on the left and Detective Berger was at that door. (RP 53, Lines 6-15). Berger asked if he was Tim Haddon and when he indicated he was, Berger asked if it would be okay if they came in and talked to him. (RP 53, Lines 20-25). Haddon testified that he asked Berger what it was about and Berger said that they had a subpoena for his appearance in Coeur d'Alene. Berger also said that Haddon could either let him in, or they could go talk about this downtown. Haddon testified that his impression was that if he didn't let them in, they were going to take him with them and so, given the choice between being hauled into jail and letting them in, he let them in. (RP 54, Lines 5-19). He also testified that if they had not made that statement to him, he would not have allowed them inside his residence. (RP 54, Lines 20-22). He testified that the reason he would not have otherwise allowed them in was due to the presence of marijuana in his home. (RP 54, Lines 23-25). The defendant testified that Detective Berger made it plain when they were talking at the back door that he wanted to talk to Haddon about money laundering and some emails that his brother had sent to him a couple of months previously. (RP 53, Lines 19-25, RP 56, Lines 1-7). Berger also indicated to him at that point that he wanted to know about Haddon's potential involvement in his brother's activities. (RP 56, Lines 8-13). Haddon testified that in the course of the interrogation, Berger and Nelson took a good cop/bad

cop approach. (RP 56, Lines 19-23). As an example, he described Berger asking him a question and that when Haddon responded that he didn't know, Berger would lunge up and say "are you going to be a friendly witness or a hostile witness?" and that they were trying to put words in his mouth, getting him to say things that he had not said. (RP 57, Lines 2-9). They were also asking him about his involvement in criminal activity, inquiring if he had ever handled any money for his brother. (RP 57, Lines 16-24). He testified that during the course of the interview, he was not free to leave, because every move he made they were right on his tracks, making sure he didn't do anything wrong and every time he went into the kitchen to get a drink of water at least one of them was with him; everywhere he moved anywhere at all, they always kept him in their sight, even before Christensen brought up the marijuana. (RP 58, Lines 14-25, RP 59, Lines 1-4). He testified that when Christensen asked him if he had any marijuana in the house, he was standing in the doorway between the dining room and the kitchen, and Haddon asked him who he was since they had not been introduced. When Christensen introduced himself, Haddon asked him what he would say if Haddon said no to that question and Christensen said, "well then we'd get a search warrant and you'd go to jail". (RP 59, Lines 9-22). He testified that he understood from the statements that they made that if he didn't make things easier for them that things would go harder for him, that he had a choice between answering their questions and going to jail and that the reason why he gave the consent to search was to avoid going to jail. (RP 60, Lines 2-

14). He felt at that time that he had no choices in the matter. (RP 60, Lines 15-17). He also testified that after his wife came home, about 20 minutes before the Cowlitz County Deputies arrived, they continued to put restrictions not only on his movements, but also his wife; when she got home, after they got done questioning her, she asked if she could change her clothes and they said "no, we do not have a female officer to guard you while you do that, and we can't let you out of our sight." (RP 61, Lines 1-14). He also testified that up to the time Brewer came in none of these officers advised him of his Miranda warnings or that he had a right to refuse the consent to search, or that he could limit the scope of the search or revoke his consent at any time. (RP 61, Lines 15-25, RP 62, Line 1). On cross-examination, he testified that when Deputy Brewer read him the consent to search form, he understood that he could limit the scope of the search or could stop the search at any time, if he wanted to go to jail, even though Brewer never told him that he would go to jail if he didn't consent to the search. (RP 62, Lines 8-22). He also testified that when Detective Berger contacted him at the door, Berger said he was there to serve a Grand Jury Subpoena, to discuss his brother's activities and to question him about his possible involvement; also, that Berger came into his residence under duress. (RP 64, Lines 8-24). He also confirmed that when Christensen had asked him if he had a marijuana grow that he had told them that he wanted them to leave and they did not leave; they said if they left he was going to go with him. (RP 65, Lines 21-25, RP 66, Lines 1-6). He testified that it took well over an

hour for the Cowlitz Deputies to arrive at his residence. (RP 66, Lines 7-9). On re-direct, Haddon confirmed that when Brewer showed him the consent paperwork and asked him to sign it, the other officers were still there and at that point, if he had not signed the paperwork, he believed they would have taken him to jail. (RP 66, Lines 22-25, RP 67, Lines 1-7).

The state recalled Sgt. Christensen, who testified that the defendant had not asked him and the other officers to leave the premises. (RP 68).

In the course of argument, the defense contended that the major issue was that when the police went to the defendant's residence their purpose was to interrogate him about his involvement in criminal activity, such as money laundering, wrapped up in a marijuana trafficking and growing operation and that they were planning to confront him and find out information pertaining to his involvement in his brother's criminal activities. There was also evidence from the state's witnesses that their plan was that although they smelled marijuana that they would address other issues before they addressed the issue of the growing marijuana and that they asked him questions about exchanging marijuana with his brother as a jump off point to discussing the marijuana grow, and that during all of this, they had not only failed to provide him with his Miranda rights, but also failed to give him any of the Ferrier warnings. (RP 69, 70, 71). It was contended that the purpose of the Ferrier Rule was to make the types of police procedures utilized in this case less coercive, and to insure that

someone in Mr. Haddon's position possessed the knowledge necessary to make an informed decision regarding the police entry and search of his residence. (RP 72). In this case, it was contended that the police had used coercive tactics to gain entry to the residence as well as to procure consent to search, all without benefit of the Ferrier warnings. (RP 73). It was also argued that the police had preplanned their approach to Mr. Haddon's residence weeks before their arrival and that the police readily acknowledged that their plan was to investigate his involvement in money laundering and trafficking in marijuana when they arrived on his premises. Also, when they arrived and actually smelled the odor of marijuana outside the premises, there was a quick agreement between Berger and Nelson to investigate Mr. Haddon's involvement in his brother's activities, and then pursue a line of questions regarding the odor of growing marijuana with Mr. Haddon. However, it is clear from Christensen's testimony that he was trying to dissuade Mr. Haddon from requiring them to get a warrant, i.e., make things easier for the police and they would make things easier on Mr. Haddon, which certainly tends to coincide with Mr. Haddon's testimony that he was told that if the police were required to get a warrant, he would go to jail. (RP 79,80).

In making its ruling, the court noted that the police did not initially proceed to the residence for the purpose of investigating a marijuana grow at Mr. Haddon's residence; they smelled marijuana in the course of trying to contact Mr. Haddon and they were within the proper bounds of the curtilage when they smelled the marijuana,

which constituted probable cause. (RP 80). The court did not consider this a knock and talk situation, so Ferrier was not needed at the point of contact. The court was inclined to believe Mr. Haddon's testimony and Mr. Haddon appeared to be a straightforward and reliable individual. The court also stated that when the officers were speaking to Mr. Haddon, Officer Christensen made it clear that if he moved they were going to go with him and he wasn't going to move unless the police could go with him. They also told his wife she couldn't change clothes. Mr. Haddon, and later Mrs. Haddon, due to the restriction of their freedom of movement, were under arrest at that point. Their arrest was appropriate at that point since they had probable cause to arrest him on the marijuana grow. (RP 81). However, assuming the initial entry into the residence was improper as a result of the coercive threat to arrest him if he did not allow entry, the court indicated that the search that results in the discovery of the marijuana was sufficiently attenuated from that event that it would still be appropriate. The court stated that the smell of marijuana provided probable cause prior to any potentially inappropriate conduct, and the Ferrier warnings were provided by the Cowlitz County Sheriff's Office, the court also indicated that while the court assumed that it was correct that Mr. Haddon signed the consent to search believing that if he didn't, he was going to go to jail, it was a coercive circumstance, but was not brought about by any improper action by the officers (RP 82). The court concluded by indicating that whatever the actions of the officers, assuming that they were

inappropriate, the search was sufficiently attenuated from the entry into the residence so that the suppression motion should be denied. (RP 83, Lines 1-5).

ARGUMENT

I. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED IN THE ABSENCE OF FERRIER WARNINGS AT THE THRESHOLD.

Exceptions to the requirement of a warrant are jealously and carefully drawn, and the state has the burden of establishing that a warrantless search falls within one of the exceptions of the warrant requirement. State v Hendrickson, 129 W2d 61, 70, 917 P2d 563 (1996). That case held that under the Washington Constitution, warrantless searches are unreasonable per se. The Washington Constitution grants citizens privacy, especially in their homes, and the closer officers come to intrusion into a dwelling, the greater the State Constitutional protection. State v Johnson, 104 W.App 409, 415, 16 P3d 680 (2001), State v Young, 123 W2d 173, 185, 867 P2d 593 (1994).

The facts in the case of State v Ferrier, 136 W2d 103, 960 P2d 927 (1998), certainly resemble the facts of this case. The police had information that Ferrier was growing marijuana in her home. The police “hatched a plan to conduct a “knock and talk”” because they didn’t want to obtain a warrant, which would require the disclosure of an informant’s identity. Four police officers went

to Ferrier's residence; two went to the back of the house and the other two proceeded to the front entrance. They identified themselves as police officers and Ferrier allowed them into her house. The two officer in the rear were contacted and also entered the dwelling; the 15 by 15 front room contained the defendant, two grandchildren, and the four police officers. She was told that they had information that there was marijuana growing in the house and they wanted to search the home. She was asked to consent to the search of her residence, which she did; she led them to a locked door which she unlocked for them; the search of this room resulted in seizure of a number of marijuana plants. On appeal, Ferrier contended that the police procedure was violative of her constitutional rights. In rendering its decision, the court considered it to be of significance that the contact was in her home and that the officers admitted that they conducted the knock and talk in order to avoid the necessity of obtaining a search warrant authorizing a search of the home. The court noted that this "flies in the face of our previous admonition that "where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so. ...Finally, and most importantly, the officers concede that they did not advise Ferrier that she had the right to refuse to consent to a search of her home. Based on these facts, all of which were found by the trial court, we conclude that the knock and talk, as carried out here, violated Ferrier's constitutional right to privacy in her home and, thus, vitiated the consent she gave. This is so because she was not advised prior to giving consent to the

search of her home, that she could refuse to consent.” 136 W2d at 115. The court continued to note that any knock and talk is inherently coercive, observing that the evidence reflected that virtually everyone confronted by a knock and talk accedes to the request to permit a search of their home. The court stated that the coercive effects of the knock and talk could be mitigated by requiring officers who conduct the procedure to warn home dwellers of their right to refuse to consent to a search. The court then adopted the following rule: “that 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 the home, vitiates any consent given thereafter.” 136 W2d at 118, 199.

In the present case, it is very important to recognize that although the police only planned to interrogate Haddon about his involvement in his brother’s criminal activities when they proceeded to his residence, once they arrived and noticed the odor of growing marijuana emanating from his residence, they immediately planned to pursue an investigation of the marijuana grow, once they had completed their interrogation of Haddon regarding his involvement in his brother’s activities. They hatched this plan when they were

standing outside the front of Haddon's residence, before he answered the door. Consequently, pursuant to the ruling of the Washington Supreme Court in the ruling of State v Ferrier, supra, the Idaho State Patrol Detective and the Internal Revenue Service Special Agent, as well as the Clark County Deputy, all of whom had smelled the marijuana grow before entering, and planned to investigate that matter as well as the other matters upon entering, were required to inform Haddon, prior to entering his home, that he had a right to lawfully refuse to consent to the search for the marijuana grow, that he could revoke at any time any consent that he might give, and that he could limit the scope of the search to certain areas of his home. The failure of the officers to provide these warnings, prior to entering his home, vitiates the consent that he provided thereafter.

The state will undoubtedly contend that Ferrier warnings are not required because the officers went to his residence for reasons other than searching for contraband. In State v Kennedy, 107 W.App 972, 29 P3d 746 (2001), the police gained access to Kennedy's motel room by asking if they could come inside and talk about a complaint they had received concerning the room. They had received a complaint about a narcotics transaction between the complaining individual's girlfriend and Kennedy at the motel. They went to the motel room, knocked on the door, and when Kennedy opened the door, they told him they had received a complaint and asked if they could come in and talk about it. Kennedy waved them in and when they got inside, they noticed a plastic baggie with a

white powder residue lying on top of a pile of clothes on a credenza, which contained methamphetamine. The trial court ruled that Kennedy's apparent consent to the entry was not voluntary because the police had not advised him of his right to refuse consent. On appeal, the state challenged the suppression ruling, contending that this advisement was not necessary because the police were merely investigating a complaint, not seeking consent to search, arguing on the basis of State v Bustamante-Davila, 138 W2d 964, 983 P2d 590 (1999), that the Ferrier warnings were not necessary. The court distinguished the facts in the latter case, which simply involved some law enforcement officers accompanying an INS Agent to the defendant's home to arrest him under a removal order; since they were not looking for contraband but simply backing up the INS Agent, the rifle that they observed in plain view was not subject to suppression. The court also distinguished the case of State v Williams, 142 W2d 17, 11 P3d 714 (2000), where officers went to a residence to execute an arrest warrant. The Williams court had limited the requirement Ferrier warnings "to situations where police seek to conduct evidence for contraband or evidence of a crime without obtaining a search warrant." 142 W2d at 28. The court noted that the reason the officers visited Kennedy's motel room was to investigate a narcotics complaint. The court also rejected the state's attempt in that case to distinguish receiving consent to enter from consent to search. The court held that the purpose of the Ferrier rule is to mitigate the inherently coercive nature of police procedures to gain access to

the interior of a home where they could see what was in plain view and then decide whether to conduct a further search. The court held that requiring the police to inform the residence of his right to refuse consent before they enter a home promotes the purpose of insuring that the home dweller who consents to a warrantless search possess the knowledge necessary to make an informed decision. “Thus, the officer’s request for permission to enter is, in effect, a request for permission to “search” for anything in plain view.” 107 W.App. at 977.

In the present case, while it is true that the police officers intended to gain access into Haddon’s home for the purpose of acquiring information concerning his possible involvement in his brother’s money laundering and marijuana trafficking activities, it is also beyond question that before they knocked on his door, they had also formed the plan to investigate the marijuana grow operation inside his residence, which they had detected while still outside. Under these circumstances, according to the clear authority of the above cases, while conducting a search for the marijuana grow without going through the trouble of obtaining a warrant was not their sole purpose in gaining access into his residence, it was certainly one of their purposes, and thus Ferrier warnings were required to be provided to Haddon, not an hour and a half later, after the police have already entered, interrogated, and seized both Haddon and his wife, but at the threshold to his residence, when he responded to their knock on his door. The ruling of the court in State v Holmes, 108 W.App. 511, 31 P3d 716

(2001) is in accord; in that case, the police went to Holmes' apartment without a warrant, intending to search for contraband, and entered his apartment without advising him of the right to refuse consent. In response to Holmes' protests when they told him he stood accused of dealing drugs, the officer told him that he was only looking at a possession charge if he was telling the truth, whereupon Holmes consented to the search. The court stated that "this is precisely the coercive situation the Ferrier court sought to prevent. Holmes' consent, standing alone, was inadequate under Ferrier to authorize the initial entry or the search." 108 W.App. at 518.

Furthermore, there is nothing in the record which would indicate that the search in this case was sufficiently attenuated from the improprieties of the officers when they made their entrance into Haddon's residence. The relevant question in determining if evidence obtained following an illegality on the part of the police officers must be excluded, is whether police obtained the evidence by exploiting the illegality, or whether the means of obtaining the evidence was sufficiently distinguishable from the illegality to purge the primary taint. Wong Sun v United States, 371 US 471, 488, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); State v Gonzales, 48 W.App 388, 398, 731 P2d 1101 (1986). If evidence is obtained as a result of a defendant's consent to search, the voluntariness of the consent or confession is a threshold requirement but is not alone sufficient to purge the evidence of the primary taint. Brown v Illinois, 422 US 590, 602, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). The trial court

indicated that it believed Haddon's description of events, and Haddon had testified that not only had the police failed to advise him of any Ferrier warnings before entry, but they had actually threatened their way inside his residence, thereafter constraining and controlling his movements during the course of an aggressive interrogation, all without benefit of Miranda warnings culminating in eliciting a confession regarding growing marijuana in his residence, then securing his consent to search by threatening him with jail if the consent was not forthcoming. There is simply nothing that could purge the primary taint of the initial illegality. There were no significant intervening circumstance, but rather a continuation of coercive behavior, for the express purpose of securing his consent to the search so that they would not be encumbered with the additional three hours of paperwork involved in securing a search warrant, which certainly qualifies as flagrant misconduct. Under these circumstances, there is nothing that could remove the initial and continuing taint of the illegal entry, except perhaps the police abandoning their course of action and procuring a search warrant, but as one of them testified in the course of the hearing, that would have taken too much time and effort.

Consequently, based on the above authorities, since the officers had planned to pursue the investigation of a marijuana grow inside Haddon's residence without taking the additional time necessary to procure a warrant, they were clearly required to provide the Ferrier warnings to Haddon at his door before entering his home, and their failure to do so requires the reversal of the trial

court and the suppression of the evidence that was subsequently seized inside the residence.

II. THE CONSENT WAS INVOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES.

In addition to the authorities cited above, it is also evident that in any event, when considering all of the circumstances in this case, the consent obtained from Haddon to search his residence was clearly coerced, involuntary, and thus cannot support the warrantless search of his residence.

For a consent to search to be valid, it must be obtained without coercion either by explicit or implicit means. Bumper v North Carolina, 391 US 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968). Consent must result from a person's own "essentially free and unconstrained choice" whose will has not been "overborne" and whose "capacity for self determination (has not been) critically impaired" Schneckloth v Bustamante, 412 US 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed. 2d 854 (1973). The burden of showing that a person consented to a search is upon the state, and it must establish such consent by clear and positive evidence. In Re McNear v Rhay, 645 W2d 530, 537, 398 P2d 732 (1965). When a fundamental constitutional right is at issue, the court must independently examine the record to determine whether there has been a denial of due process of the law. In Re McNear v Rhay, supra. In the case of State v Werth, 18 W.App. 530, 571 P2d 941 (1977) the police had decided to conduct a search of Werth's home

for an escapee from the Washington State Reformatory. The police procured neither a search nor an arrest warrant but proceeded to Werth's home, told her that her house was surrounded and that she should immediately come outside, keeping her hands in plain view. She was then told that the escapee was hiding in her home; she denied this and told them to go ahead and take a look. She was not asked for permission to search. The court considered there to be many coercive factors present in that case. The court considered that she was under arrest because her liberty of movement had been constrained, and she was not informed of her right to refuse consent to the search. Also, the contacts with the police two days previously when they had conducted an illegal search had convinced her that the police were going to search her home with or without her consent. While she had verbalized her consent to the search, the court could not see that the state had established by clear and positive evidence that her consent resulted from her own essentially free and unconstrained choice, and consequently held that she had not voluntarily consented to the search of her home.

In State v Bustamante-Davila, 138 W2d 964, 981, 983 P2d 590 (1999), some factors included in determining whether consent is freely given are whether Miranda warnings had been given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person had been advised of his right to refuse consent. It is important to note that in reviewing the circumstances pertaining to the issue of

voluntariness in this case, the trial court stated that he was inclined to believe Haddon's version of how this event had transpired. The court accepted that when the police had contacted Haddon at his door, they had informed him that either they could come into his home to discuss things, or he could accompany them downtown, i.e., that he would be taken into custody if he refused to grant them access to his home. He had also testified that once they were inside, the police officers had grilled him, using a good cop/bad cop routine, regarding whether he was involved in his brother's criminal activities, money laundering and trafficking in marijuana. In fact, the police acknowledged that they used the interrogation about the brothers sharing marijuana as a jumping off point for inquiring about the marijuana grow that they had detected inside Haddon's residence. Haddon testified that he had been informed that if he made things easier for them, they would make things easier for him, but that if he did not cooperate, they would get a warrant and he would go to jail. One of the officers acknowledged in his testimony that they were trying to avoid the additional three hours of activities required to obtain a search warrant for the premises. Under these circumstances, his consent at that point to allow them to search his house without a warrant was clearly coerced and involuntary. In addition, it is also undisputed that at the time that they coerced his consent to the search, the police had never advised him of his Miranda warnings, notwithstanding the fact that they were controlling his movements while conducting an intimidating interrogation regarding his involvement in criminal

activity, nor had they advised him that he had the right to refuse to consent to the search. Under all of these circumstances, it certainly cannot be said that in the present case, the state established by clear and positive evidence that Haddon's consent resulted from his own essentially free and unconstrained choice. Therefore, according to the above authorities, his consent was provided involuntarily, and thus the evidence subsequently seized was the product of an unlawful search of his premises and should have been suppressed.

CONCLUSION

Based on the above authorities, the appellant requests that the trial court's decision denying the suppression motion be reversed, that the evidence be suppressed, and that the charge against Timothy Haddon be dismissed with prejudice.

Dated this 8th day of June 2006.

Respectfully Submitted,

JAMES K. MORGAN, WSB # 9127

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COURT OF APPEALS

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STATE COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION II

BY JN

STATE OF WASHINGTON,)
Respondent,)
v)
TIMOTHY HADDON)
Petitioner)

No. 33876-9-II
Cowlitz County No. 04-1-01522-4

CERTIFICATE OF
MAILING

I, Jeanne Struthers, certify and declare:

That on the 8th day of June 2006, I deposited in the mails of the United States Postal Service, next day delivery, a properly stamped and addressed envelope, containing Brief of Appellant addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

And, in the mails of the United States Postal Service, first class mail, a properly stamped and addressed envelope containing Motion for Extension of Time addressed to:

Deputy Prosecuting Attorney
Hall of Justice
312 SW First
Kelso, WA 98626

Timothy Haddon
155 Lariat Drive
Amboy, WA 98601

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of June 2006.


Jeanne Struthers

James K. Morgan
ATTORNEY AT LAW
1555 THIRD AVE., SUITE A
LONGVIEW, WA 98632
(360) 425-3091
FAX (360) 414-0950