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NO. 34865-9-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BRIAN SMITH,

Appellant,

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COURT OF APPEALS  
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D. M. SMITH

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Suppression Hearing Judge  
The Honorable Richard D. Hicks, Trial Judge  
Cause No. 05-1-01532-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Smith's motion to suppress evidence where
02. In denying Smith's motion to suppress evidence, the trial court erred in entering Findings of Fact 1, 5, 6, 7, as fully set forth herein at pages 2-3.
03. In denying Smith's motion to suppress evidence, the trial court erred in entering Conclusions of Law 1, 2, 3, as fully set forth herein at pages 3-4.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in denying Smith's motion to suppress evidence where information gained from the unconstitutional warrantless search was used as the basis to obtain the search warrant? [Assignments of Error Nos. 1-3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Brian Smith (Smith) was charged by first amended information filed in Thurston County Superior Court on October 4, 2005, with two counts of unlawful possession of a controlled substance with intent to deliver, counts I and IV, two counts of unlawful possession of a controlled substance, counts II-III, unlawful use of drug paraphernalia, count V, and bail jumping, count VI, contrary to RCWs

9A.76.170, 69.50.401(2)(a) and (b), 69.50.4013(1) and 69.50.412(1). [CP 7-8].

The court denied Smith's pretrial motion to suppress evidence under CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

#### A. FINDINGS OF FACT

1. On the evening of August 14, 2005, Olympia Police Officers exercised their community caretaking responsibilities by transporting Harold Briggs to his residence and by assisting Briggs into the residence, since Briggs was too intoxicated to return home safely on his own.

2. Upon arriving at Briggs' residence, one of the officers knocked on the door.

3. A woman answered the door who was not known to the officers who stated she did not live in the residence, but rather was only there to use the bathroom.

4. The officers then assisted Mr. Briggs into the living room of his residence where he sat down on the couch.

5. In speaking with the woman, Taura Freeman, Officers Lindros and Anderson noted the following: (1) that Freeman was somewhat evasive in her demeanor and the way she answered questions; (2) that Freeman positioned herself to block the way to the hallway; (3) the way Freeman looked back over her shoulder; (4) Freeman's indication that she did not know whether anyone else was in the residence; and (5) the lack of any explanation from Freeman as to why she was in the

residence to use the bathroom when she lived in the area.

6. The officers became reasonably concerned that there might be a burglary or other crime in process within the residence, that there might be another person located within the residence who had no right or permission to be there; and that Mr. Briggs' safety might be at risk if the officers left or that their own safety could be at risk if they remained.

7. Officer Anderson proceeded to take a quick look through the residence based on those concerns, momentarily sticking her head inside the doorway of one room and then immediately exiting the room. In that brief moment, Officer Anderson smelled the strong odor of fresh marijuana coming from inside the room.

8. Officer Anderson then proceeded to seek a telephonic search warrant from the Honorable Judge Wm. Thomas McPhee.

Based on the above Findings of Fact, and the applicable legal principles, the Court makes the following:

## II. CONCLUSIONS OF LAW

1. The officers in this case acted appropriately, consistent with their community caretaking responsibilities, in assisting Mr. Briggs into the living room of his residence.

2. Under the circumstances the officers were confronted with upon assisting Mr. Briggs into his residence, including Briggs' level of intoxication and Freeman's behavior, it was a reasonable extension of the officers' community caretaking responsibilities for Officer Anderson to

conduct a brief sweep of the residence in order to determine whether anyone else was present or whether a burglary or other crime was in progress therein.

3. The information thereafter provided by Officer Anderson to Judge McPhee in support of the request for a search warrant was obtained legally by the police officers in this case.

4. Sufficient information was given to Judge McPhee on August 4, 2005, for a reasonable magistrate to conclude that there was probable cause to authorized a search warrant in this case.

Based upon the above Findings of Fact and Conclusions of Law, the Court hereby denies the defendant's motion to suppress evidence pursuant to CrR 3.6.

[CP 70-72].

Following a bench trial, the court entered the following Findings of Fact and Conclusions of Law for Trial Without a Jury:

On January 25, 2005, a trial without a jury was held pursuant to CrR 6.1 before the Honorable Richard Hicks. Pursuant to agreement of the parties that this case may be decided based upon a reading of the police investigation packet and Washington State Patrol Laboratory Report attached hereto and incorporated by reference, and defendant's agreement that said reports are sufficient for a finding of guilt, the court has reviewed said police reports and enters the following:

#### I. FINDINGS OF FACT

1. This court has jurisdiction over the parties and subject matter;

2. On August 15, 2005, in Thurston County, Washington, the Defendant's residence at 1328 Fones Road SE #13 in Olympia, WA was searched for controlled substances pursuant to a search warrant issued by Judge Thomas McPhee. During the search, Brian Leonard Smith was found hiding in a bedroom of the trailer. In that bedroom, Officer Anderson located a backpack and found two rolls of cash which contained \$1855.00 in small denomination bills. Also located inside the bedroom was a toolbox containing two small electronic scales and many baggies commonly used in packing narcotics. Inside a smaller bag, officers located several small zip locked baggies with a white crystal substance suspected to be methamphetamine. The baggies weighed 17.3 grams , 12.4 grams, 2.0 grams, and 2.8 grams. Also located in the toolbox was a baggie containing several pills. Nineteen of the pills were identified by their markings as Clonazepam. Two pills were identified by their markings as Oxycodone. Another three pills were identified as dihydrocodeinone. Also located in the bedroom was a wristband from the Thurston County Jail with Brian L. Smith's name and picture. Officers found additional correspondence and paperwork associated with Mr. Smith in the bedroom. Several items of drug paraphernalia were located in the bedroom to include smoking devices with residue.
3. The Washington State Patrol Crime Laboratory performed an analysis on the white crystal substance and determined it to be methamphetamine. The nineteen green pills were found to be Clonazepam. Two

white round tablets were analyzed and found to be Oxycodone. Two white oblong tablets were analyzed and found to contain Dihydrocodeinone.

4. Methamphetamine, Clonazepam, Oxycodone, and Dihydrocodeinone are all controlled substance.
5. Mr. Smith was in actual and constructive possession of the controlled substance located in his bedroom.
6. The Methamphetamine found in Mr. Smith's bedroom was of such quality and the manner in which it was packaged indicates the drugs were possessed for purpose of delivery. In combination with the large amount of money, scales, baggies, proximity to the other controlled substance and other drug paraphernalia also prove the aspect of possession with intent to deliver.
7. The nineteen pills of Clonazepam were also possessed with intent to deliver based on the same factors identified with the methamphetamine.

Having so found, the Court enters the following:

## II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.
2. The Defendant is guilty beyond a reasonable doubt of the offense of Unlawful Possession of a Controlled Substance, to-wit: Methamphetamine with intent to Deliver.
3. The Defendant is guilty beyond a reasonable

doubt of the offense of Unlawful Possession of a Controlled Substance, to-wit: Oxycodone.

4. The Defendant is guilty beyond a reasonable doubt of the offense of Unlawful Possession of a Controlled Substance, to-wit: Hydrocodone.
5. The Defendant is guilty beyond a reasonable doubt of the offense of Unlawful Possession of a Controlled Substance, to-wit: Clonazepam with intent to Deliver.
6. The Defendant is guilty beyond a reasonable doubt of the offense of Unlawful use of Drug Paraphernalia.
7. Count VI Bail Jumping was dismissed by the State.

[CP 44-46].

Smith was sentenced under the Special Drug Offender Sentencing Alternative (DOSA) and timely notice of this appeal followed. [CP 52-61].

02. Substantive Facts: CrR 3.6 Hearing

On August 14, 2005, at approximately 6:55 p.m. the police responded to a dispatch that a person later identified as Harold Briggs was involved in a disturbance. [RP 01/23/06 16-17]. Briggs, who was intoxicated, accepted the offer of a “courtesy transport” home. [RP 01/23/06 19].

Briggs was assisted to his residence, “a very small trailer(,)” where the police knocked on the front door, which was answered by Taura Freeman. [RP 01/23/06 19-21]. Freeman gave the police permission to assist Briggs into the trailer because of concerns that he might fall and hurt himself. [RP 01/23/06 20, 35]. The police placed Briggs on the couch, where he immediately “went to sleep.” [RP 01/23/06 21].

Freeman, who appeared nervous, gave the police her name and explained that she lived in the next trailer and that she had come into the house through the backdoor to use the restroom. [RP 01/23/06 23, 36]. The police were unaware of who lived at the residence other than Briggs, thought that Freeman may be “unwanted there in the residence [RP 01/23/06 23](,)” and were concerned for their safety should there be “anybody else in the residence.” [RP 01/23/06 23].

(Freeman) became real defensive again, started backing up towards the hallway that she said she came down and crossed her arms and took a stance like she wasn't going to let us look behind her, like something was wrong.

[RP 01/23/06 27].

When Freeman responded that she didn't know if there was anybody else in the house, the police informed her that

for our safety and for his safety, we need to make sure while we're talking to you that no one else is in this residence, that no one is going to pop up and

hurt us or him while we're standing here talking to you.

[RP 01/23/06 28].

Officer Anderson then checked the hallway, the backroom and the bathroom while Officer Lindros remained with Freeman and Briggs in the front room. [RP 01/23/06 28]. She denied that she broke a latch in order to gain entry into the back bedroom. [RP 01/23/06 67]. When Anderson returned, she made it "known that no one else was in the residence, that it was safe for us to go ahead and talk and figure out what was going on."

[RP 01/23/06 29]. At this point, Briggs started to come to and acknowledged that he knew Freeman and that she was okay to be there, at which point Freeman stated she would stay with Briggs to make sure he was okay. [RP 01/23/06 29, 59-60]. Freeman told the officers before they left that "she takes care of Briggs occasionally." [RP 01/23/06 39]. The two officers then exited the trailer. [RP 01/23/06 29].

Once outside the trailer, Officer Anderson disclosed that she had smelled the scent of marijuana from the back bedroom. The decision was then made to seek a search warrant. [RP 01/23/06 30, 41]. The warrant was issued and executed the same day. [RP 01/23/06 42].

Freeman testified that she lived next door, that she was using Briggs's bathroom because of a problem with her bathroom, that she had

permission to be in the trailer and that she “had no clue that anybody was there.” [RP 01/23/06 48-49]. “I told them I was the neighbor and gave them my name, Taura Freeman.” [RP 01/23/06 56]. “I told them why (I was there), but they didn’t believe that I was the neighbor.” [RP 01/23/06 56]. She was there to use the bathroom: “I wasn’t going to go squat outside.” [RP 01/23/06 51].

I was standing right in the way and I said, “I don’t feel like that’s, you know appropriate. Isn’t it illegal to come in and just search somebody’s home?” And she said no, and she pushed past me and there was a lock to the back door and I heard a pop and it opened.

[RP 01/23/06 51].

Smith testified that he was renting a room from Briggs. [RP 01/23/06 63].

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING  
TO SUPPRESS EVIDENCE SEIZED  
WHERE INFORMATION GAINED FROM  
THE UNCONSTITUTIONAL WARRANTLESS  
SEARCH WAS USED AS THE BASIS TO  
OBTAIN THE SEARCH WARRANT.

01. Overview

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, sec. 7 of the

Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).

In determining whether the exigencies of a particular case permit the police to conduct a warrantless search, “[t]he totality of circumstances said to justify a warrantless securing or search ... will be closely scrutinized.” State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978). Under Const. art. I, § 7 and the Fourth Amendment, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 451, 909 P.2d 293 (1996); State v. Parker, 139 Wn.2d at 49

When 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 304, 312, 4 P.3d 130 (2000).

## 02. Standing

As a prerequisite to asserting an unconstitutional invasion of rights, a person must demonstrate that he or she has a legitimate expectation of privacy in the area or item searched. State v. Goucher, 124 Wn.2d 778, 787, 881 P.2d 210 (1994); State v. Jones, 68

Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1997). A legitimate expectation of privacy exists if the “individual has manifested an actual subjective expectation of privacy in the area searched or item seized and society recognizes the individual’s expectation as reasonable.” State v. Gocken, 71 Wn. App. 267, 279, 857 P.2d 1074, review denied, 123 Wn.2d 1024 (1994). The burden is on the defendant to establish the expectation of privacy. State v. Jones, 68 Wn. App. at 847.

As acknowledged by the trial court, Smith had a legitimate expectation of privacy in the residence where he was residing and has standing to challenge the search and seizure here at issue. [RP 01/23/06 45].

### 03. Community Caretaking

As previously noted, warrantless searches are per se unreasonable unless they come within one of the narrowly drawn exceptions, one of which is the community caretaking function. State v. Johnson, 104 Wn. App. 409, 414, 16 P.3d 680, review denied, 143 Wn.2d 1024 (2001); State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). The scope of the exception is the same under state and federal law. State v. Johnson, 104 Wn. App. at 418. The reviewing court must be satisfied that the claimed emergency was not a pretext for conducting an evidentiary search, State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989), and must

balance the competing policies of allowing police to help people who are injured or in danger while also protecting citizens against unreasonable searches. State v. Johnson, 104 Wn. App. at 414; Kalmas v. Wagner, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997).

This exception allows police to conduct a noncriminal investigation if necessary to provide emergency aid or a routine check on health or safety. State v. Kinzy, 141 Wn.2d at 386. It applies when:

- (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.

Courts must cautiously apply the community caretaking function. Kinzy, 141 Wn.2d at 388. “Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.” Kinzy, 141 Wn.2d at 388 (footnotes omitted). Accordingly, the scope of the caretaking function is limited to

the extent necessary to carry out the caretaking function. State v. Orcutt, 22 Wn. App. 730, 735 n.1, 591 P.2d 872 (1979).

04. Exigent Circumstances: Protective Sweep

Another exception to the warrant requirement is exigent circumstances. State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). In determining whether exigent circumstances exist, this court applies several factors, including the seriousness of the offense with which the suspect is charged; whether the suspect is reasonably believed to be armed; whether there is reasonably trustworthy information that the suspect is guilty and the suspect is on the premises; the likelihood that the suspect will escape if not swiftly apprehended; and the entry is made peaceably. State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002). “The focus of this exception is the impracticability of obtaining a warrant.” State v. Rulan C., 97 Wn. App. 884, 889, 970 P.2d 821, 990 P.2d 422 (1999) (quoting State v. Audley, 77 Wn. App. 897, 905, 894 P.2d 1359 (1995)). Generally, this exception applies in the context of danger to the police or public, where the suspect is fleeing, or where there is a danger of destruction of evidence. State v. Rulan, 97 Wn. App. at 889.

When exigent circumstances are present, law enforcement may take reasonable actions to secure their safety when entering a dwelling.

State v. Cardenas, 146 Wn.2d at 410. If the protective search is incident to an arrest, the police may look in places immediately adjoining the place of arrest as a precautionary measure. Maryland v. Buie, 494 U.S. 325, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). Otherwise, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Id.

05. Application of Law to Facts

As previously set forth, in denying Smith’s motion to suppress evidence seized from the residence, which formed the sole basis for issuance of the subsequent warrant, the trial court, after initially finding and concluding that it was reasonable for the officers to assist Briggs into his residence and to place him on the couch, held that a reasonable extension of the exercise of this activity, based on their contact with Freeman, permitted a protective sweep of the residence to determine whether anyone else was present or whether a burglary or other crime was in progress. [Findings of Fact 1, 5, 6, 7; Conclusions of Law 1, 2, 3 CP 70-72]. This reasoning is not persuasive.

When the officers entered the residence, they had no information to indicate there were any victims or suspects relating to any offenses

therein. Freeman, unlike, it is assumed, most burglars, voluntarily answered the knock at the door, gave the police her name and, most crucially, told them where she lived (next door), in addition to admitting she was there to use the bathroom, specifically the toilet, which, if untrue, takes some imagining. Based on this and the fact that Freeman appeared nervous and crossed her arms and stood in front of the hallway in the, by all accounts, “very small trailer(,)” the police determined “something was wrong(,)” enough so that they conducted a criminal investigation in violation of Kinzy to determine if anyone else was present or whether a burglary or other crime was in progress. The trial court deemed this “good police work.” [RP 01/23/06 85]. That is unfortunate. There was no evidence of forced entry, no evidence—say voices or sounds—that anyone else was inside the residence, no evidence that the “highly intoxicated” Briggs, who was passed out on the couch, was in need of assistance for health or safety reasons, other than the looming hangover, and no evidence that Briggs or the officers were in any danger inside the residence.

Here, the protective search occurred before the warrant was issued and before Smith was arrested, leaving the State with the burden to establish exigent circumstances constituting a threat to police or public safety to justify the protective sweep. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Taken as a whole, the record does not demonstrate that it was impractical or unsafe for the officers to attempt to acquire a warrant to search the residence before conducting the search under the guise of protective sweep. See, for example, State v. Bessette, 105 Wn. App. 793, 799-800, 21 P.3d 318 (2001). And an examination of the relevant factors in this case likewise does not support a finding of exigency, with the result that the warrantless search of the residence was without lawful authority and the resulting evidence should have been suppressed by the trial court.

06. Search Warrant Affidavit

An affidavit establishes probable cause for a search warrant if it sets forth sufficient facts to permit a reasonable person to conclude there is a probability that the suspect is involved in criminal activity and the evidence of that activity will be found at the place to be searched. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The affidavit for search warrant in this case [CP 20-28], when viewed without the information gained from the warrantless search, does not establish probable cause, with the result that the warrant should not have been issued, and the trial court erred in not suppressing all evidence seized pursuant thereto. Wong Sun v. United States, 371 U.S. 471, 484-85, 9 L.

Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

07. Conclusion

This court should reverse the trial court's denial of Smith's suppression motion and thereby dismiss his convictions.

E. CONCLUSION

Based on the above, Smith respectfully requests this court to reverse the trial court's denial of his suppression motion and thereby dismiss his convictions consistent with the arguments presented herein.

DATED this 5<sup>th</sup> day of June 2007.

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CERTIFICATE

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