

Original

FILED
COURT OF APPEALS
DIVISION TWO

07 AUG -3 AM 9:37

No. 34865-9-II

STATE OF WASHINGTON
BY *am*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SMITH,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 05-1-01532-6

BRIEF OF RESPONDENT

Carol La Verne
WSBA # 19229
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

 1. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE EVIDENCE ON WHICH THE SEARCH WARRANT WAS BASED WAS PROPERLY OBTAINED AND THEREFORE FAILING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE WARRANT. 1

 a. Standard of Review.....1

 b. The Community Caretaking Function Exception..... 2

 c. Challenged Findings of Fact.....10

 d. Factors supporting the community caretaking function..13

 e. Search warrant.....15

E. CONCLUSION.....15

TABLE OF AUTHORITIES

Washington State Decisions

State v. Acrey, 148 Wn.2d 738, 64 P.3d 594 (2003).....2, 4
State v. Cardenas, 146 Wn.2d 400, 57 P.3d 1156.....1, 5, 6, 10
State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002).....1, 5
State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000).....3, 4, 12

Decisions Of The Court Of Appeals

State v. Gocken, 71 Wn. App. 267, 857 P.2d 1074 (1993).....7
State v. Johnson, 104 Wn. App. 409, 16 P.3d 680
(2001).....1, 3, 5, 10, 13
State v. Lynd, 54 Wn. App. 18, 771 P.2d 770 (1989).....7, 8
State v. Moore, 129 Wn. App. 870, 120 P.3d 635 (2005).....9
State v. Villarreal, Jr., 97 Wn. App. 636, 984 P.2d 1064 (1999).....11

U.S. Supreme Court Decisions

Cady v. Dumbrowski, 413 U. S. 433, 93 S. Ct. 2523, 37 L. Ed.
2d 706 (1973).....3
Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)
.....5

United States Constitution

U.S. CONST. amend. IV.....2

A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the police lawfully obtained the information which formed the basis for obtaining the search warrant.

B. STATEMENT OF THE CASE

The appellant has correctly set forth the substantive and procedural facts of the case.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE EVIDENCE ON WHICH THE SEARCH WARRANT WAS BASED WAS PROPERLY OBTAINED AND THEREFORE FAILING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE WARRANT.

a. Standard of Review.

An appellate court reviews conclusions of law from an order pertaining to the suppression of evidence de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002), State v. Cardenas, 146 Wn.2d 400, 407, 57 P.3d 1156 (2002). When findings of fact are challenged, an appellate court reviews the record for substantial evidence to support those findings.

“Substantial evidence is ‘a sufficient quantity of evidence . . . to persuade a fair-minded, rational person of the truth of the finding.’” State v. Johnson, 104 Wn. App. 409, 414, 16 P.3d 680 (2001).

Warrantless searches are presumed to be unreasonable unless the State can establish that the search comes within a recognized exception to that rule:

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Generally, under the Fourth Amendment, a police officer’s seizure of either evidence of a crime in a constitutionally protected area or seizure of a crime suspect must be supported by a judicial warrant based on probable cause. A warrantless seizure is therefore presumed unreasonable under the Fourth Amendment. Nevertheless, it is also well-settled that this presumption of unreasonableness may be rebutted by a showing that a specific exception to the warrant requirement applies in the case under consideration. “The State bears the burden of showing a seizure without a warrant falls within one of these exceptions.” (Cites omitted.)

State v. Acrey, 148 Wn.2d 738, 745-46, 64 P.3d 594 (2003). The community caretaking function is one of those exceptions. Id.

In this case, the State did show that the community caretaking exception not only permitted, but required, the police to conduct the search that provided the information on which the resulting search warrant was based.

b. The Community Caretaking Function Exception.

The community caretaking exception to the warrant requirement, with respect to the Fourth Amendment, was first

announced in Cady v. Dumbrowski, 413 U. S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), and expanded by subsequent Washington cases to cover situations involving either emergency aid or routine health and safety checks. State v. Kinzy, 141 Wn.2d 373, 385-86, 5 P.3d 668 (2000). The greater the emergency, the greater the intrusion permitted. The emergency aid function 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.” Kinzy, supra, at 386. Whether the officer acted in an objectively reasonable manner is “evaluated in relation to the scene as it reasonably appeared to the officer at the time, ‘not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.’” Johnson, supra, at 420.

The emergency aid doctrine is different from the exigent circumstances exception to the warrant requirement in that the emergency aid doctrine does not involve the investigation of a crime but aiding persons believed to be in danger of physical harm or death. Kinzy, supra, at 387. Nevertheless, it will be noted in a

review of the cases cited herein, the terms “emergency aid”, “community caretaking”, “health and safety check”, and “exigent circumstances” are often used loosely, if not interchangeably.

The community caretaking function of the police is of value to our society and should be protected. It is “based on a service notion that police serve to ensure the safety and welfare of the citizenry at large.” Acrey, *supra*. at 748. “Considering the public’s interest in having police officers perform community caretaking functions, ‘police officers must be able to approach citizens and *permissively* inquire as to whether they will answer questions.”

(Emphasis in original.) Kinzy, *supra*, at 387-88.

... “[T]he emergency exception serves an important purpose: it allows police to carry out their community caretaking function to protect citizens and property.”

...

[W]e adhere to the federal test. An officer may search without a warrant when the officer subjectively believes that someone likely needs assistance for health and safety reasons, the belief is objectively reasonable, and the officer has a reasonable basis to believe that the person needing assistance is in the place to be searched. (Cite omitted.) If these requirements are met and the search is not a pretext for an investigation, no greater protection against an unreasonable search is needed.

....

Furthermore, we have recognized two competing policies in cases where the emergency exception is invoked: (1) allowing police to help people who are injured or in danger and (2) protecting citizens against unreasonable searches. . . In each case, we must balance these policies in light of the facts and circumstances. (Cites omitted.)

Johnson, *supra*, at 417-18.

The courts must balance the individual's interest in freedom from governmental intrusion against the governmental interests which justify the intrusion. For example, the State interests of "effective crime prevention and detection and exigent circumstances" support a reasonable detention under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

In his brief, Smith discusses exigent circumstances, including the six factors identified by the Cardenas court as those the court uses in considering whether a warrantless entry was justified:

(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

Cardenas, *supra*, at 406. The issue in that case concerned the warrantless entry into a motel room occupied by two burglary suspects, a very different situation than that present in the instant case. However, the court in Cardenas recognized that police officers are not obliged to make themselves sitting ducks in an unknown situation:

Police officers are not “required to proceed at their peril . . . [it is] unreasonable to expect police officers to take unnecessary risks in performance of duties.” “[I]t is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly.” Cardenas, *supra*, at 406, 408.

The trial court in Mr. Smith’s case did not find there were exigent circumstances, but rather that the protective sweep was an extension of the officers’ community caretaking responsibility. (CP 72) Although Officer Lindros did articulate that the sweep was partly for the safety of the officers, it was primarily for the protection of Harold Briggs. (1/23/06 RP, pgs. 28, 37-38, 43-44.) In either case, because of the behavior and verbal responses of Taura Freeman, the officers had reason to be concerned. It would not be logical to ask police officers to aid and protect persons such as Mr. Briggs, but then require the officers to leave them in unknown

situations that could potentially be more dangerous than the ones they were removed from.

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by not acting promptly to ascertain if someone needed help. (Cite omitted.) So long as it is undertaken in good faith and is not motivated by an intent to arrest or search for evidence of a crime, a warrantless search conducted in order to check on an individual's health or safety is a valid exception to constitutional warrant requirements.

State v. Gocken, 71 Wn. App. 267, 275, 857 P.2d 1074 (1993).

In State v. Lynd, 54 Wn. App. 18, 771 P.2d 770 (1989),

Division I discussed what it called the "emergency exception" to the warrant requirement. In that case, an officer responding to a 911 hang-up call found Lynd outside his home, loading personal property into an automobile, with a fresh cut on his face. When questioned, he told the officer he had argued with his wife, she had cut him, he had pushed, slapped, and sat on her, and that she had left the house. He refused permission to look in the home for her. The officer entered without a warrant and discovered evidence not only of a struggle, but of a marijuana grow operation. Based upon

that information, other officers obtained a search warrant, and Lynd was charged with possession of marijuana with intent to manufacture or deliver.

In affirming the conviction, the court held that for a search to come within the emergency exception:

[I]t must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was "actually motivated by a perceived need to render aid or assistance." . . . To that end, the State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed. (Cites omitted.)

.....

Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, "not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis. (Cites omitted.)

Lynd, *supra*, at 21-22.

There is not a hint in the entire transcript of the suppression hearing that the officers used the excuse of a potential danger to Briggs or the officers themselves as a pretext for the search. They did not go there on a "knock and talk," they did not go to investigate

a crime, they did not suspect, let alone believe, that there was a drug operation being conducted in the bedroom of the trailer. In his brief, at page 15, Mr. Smith acknowledges that the officers had no information that would indicate any suspects were in the trailer when they entered; there is no indication of any ulterior motive for the search. The officers went there to see that Briggs got safely home. Officer Lindros would have likely called paramedics had other officers at the scene not been familiar with Briggs and knew that intoxication was his normal state. (1/23/06 RP, pgs. 31-32)

Courts are to be cautious in applying the community caretaking function because of the risk of abuse even when the original intention is good. “The noncriminal investigation must end when reasons for initiating the encounter are fully dispelled.” State v. Moore, 129 Wn. App. 870, 879, 120 P.3d 635 (2005). In the case before this court, Officers Anderson and Lindros were concerned that there might be another person in the trailer who would not have Harold Briggs’ best interests at heart. Officer Anderson looked into the bathroom and the bedroom, intruding only long enough to determine that no one was there. The brevity of her search is underscored by the fact that someone was there and she failed to see him. (1/23/06 RP, p. 65) Almost immediately, Harold

Briggs began to regain consciousness and the officers left the trailer, having dispelled their concerns about his safety.

During the few seconds she had the bedroom door open, however, Officer Anderson recognized the odor of unburned marijuana. “Under the open view doctrine, if an officer detects something by using one or more of his or her senses, while lawfully present at the vantage point where those senses are used, no search has occurred.” Cardenas, *supra*, at 408.

c. Challenged Findings of Fact.

Mr. Smith concedes that if Officer Anderson was lawfully in the position where she smelled the marijuana, the search warrant is valid. He assigns error to four of the trial court’s findings of fact (1, 5, 6, and 7, CP 70-71) and therefore, as Johnson holds, this court must review the record for substantial evidence to support them.

Harold Briggs obviously needed somebody to help him. He was highly intoxicated, couldn’t walk unaided, and, when not being held upright, he “fell asleep.” (1/23/06 RP, pgs. 18-21) He had not committed a crime, but the owner of the premises where he was at the time wanted him removed. (1/23/06 RP, p. 18) Somebody had to do something with him, and it would not have been consistent with the duty of the police to protect the public to have left him

staggering around in traffic. The first Finding of Fact is supported by the record.

The officers clearly articulated their reasons concern when they spoke to Taura Freeman. All of the reasons the trial court listed in Finding of Fact number 5 (CP 71) are in the record. (1/23/06 RP, pgs. 22-24, 28-29, 35-40)

In the sixth Finding of Fact (CP 71) the trial court found that the officers were reasonably concerned that there might be a burglary in progress, there might be a trespasser in the trailer, and that Brigg's safety, as well as their own, might be at risk. Smith argues that burglars don't usually answer a knock at the door, but then people don't usually leave their own homes to use the bathroom in the residence next door. Although at the suppression hearing Ms. Freeman explained that repairs were being made to her own bathroom (1/23/06 RP, p. 53), she did not offer that explanation to the officers at the time. Any reasonable person would have believed something was wrong, and it is the job of the police to investigate when something is wrong. "[P]olice officers are encouraged to investigate suspicious situations." State v. Villarreal, Jr., 97 Wn. App. 636, 641, 984 P.2d 1064 (1999).

Smith also disputes Finding of Fact number seven, that Officer Anderson took a quick look through the residence because of her concerns, momentarily stuck her head inside the doorway of one room, smelling fresh marijuana, and immediately exiting the room. This finding is amply supported by the record and Smith fails to explain why it is not. He argues that Officer Anderson was conducting a criminal investigation in violation of Kinzy, (Appellant's brief, p. 16), but that is not the case. The fact that she discovered evidence of criminal activity while conducting a protective sweep of the trailer in order to make sure Harold Briggs was safe did not convert the search into a criminal investigation. That occurred later, after the search warrant was obtained.

Smith argues that because certain evidence that could indicate a burglary was missing, the officers had no reason to be suspicious. He ignores the evidence that was present, specifically Ms. Freeman's odd behavior. This is much like saying a person with a fever, nausea, and a headache isn't sick because he doesn't have a cough.

Smith claims there was no evidence that Mr. Briggs was in need of assistance, other than perhaps an aspirin later for the inevitable hangover. Harold Briggs could not walk unassisted, had

difficulty speaking, was barely conscious when being held upright, and passed out immediately upon being placed on the couch. Officers were unable to rouse him enough to find out if Ms. Freeman was permitted to be in the trailer. (1/23/06 RP, pgs. 19-21, 23, 2735-36). He obviously was in no condition to protect himself if there was, in fact, someone in the trailer who would harm him or take his property. He may not have been in danger of dying from the alcohol, but he wasn't able to tend to his own physical needs, either. The trial court was correct in finding that the officers acted appropriately.

d. Factors supporting the community caretaking function.

The facts in this case amply support the trial court's findings of fact, as well as the factors underlying the emergency aid exception, as set forth in Johnson, *supra*, at 415. Johnson includes the emergency exception in the community caretaking function.

(1) The officer subjectively believed that someone likely needed assistance for health or safety reasons. The officers who had to physically help Harold Briggs walk into his trailer subjectively believed he needed assistance for both health and safety reasons.

(2) A reasonable person in the same situation would have similarly believed that there was a need for assistance. The evidence of Mr. Briggs' extravagant intoxication would convince any reasonable person that he needed assistance.

(3) There was a reasonable basis to associate the need for assistance with the place searched. The officers were with Mr. Briggs and Ms. Freeman in a very small trailer. Ms. Freeman seemed nervous, offered a peculiar explanation for her presence there, positioned herself to block the hallway, and kept looking over her shoulder down the hallway. The officers could reasonably assume that if there was a danger, it was down the hallway. Officer Anderson looked into the bathroom and the back bedroom only long enough to ascertain (incorrectly, as it turned out) that no other person was there. She did not search closets, drawers, or any containers. She limited the scope and duration of the search to the location where the danger might be, and the time it would take to dispel any suspicion. When she had done so, and Mr. Brigg roused himself sufficiently to give permission for Ms. Freeman to be there, the officers left the trailer.

The trial court's Findings of Fact are amply supported by the record.

e. Search warrant.

Mr. Smith implicitly acknowledges that if the information in the affidavit on which the search warrant was granted was sufficient. If that information was properly obtained, then the search warrant is valid. That is indeed the case.

D. CONCLUSION

There is ample evidence to support the trial courts Findings of Fact and Conclusions of Law resulting from the suppression hearing. The State respectfully asks this court to affirm the appellant's convictions for Unlawful Possession of Methamphetamine with Intent to Deliver, Unlawful Possession of Oxycodone, Unlawful Possession of Hydrocodone, Unlawful Possession of Clonazepam with Intent to Deliver, and Unlawful Use of Drug Paraphernalia.

Respectfully submitted this 1st of August, 2007.



Carol La Verne, WSBA# 19229
Attorney for Respondent

