

NO. 35336-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

KEN D. McKAGUE,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
CLERK OF COURT
JAN 11 2010
BY: *YN*

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard D. Hicks, Judge

Cause No. 06-1-00228-1

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing McKague to be convicted on evidence that should have been suppressed where the evidence used at trial against McKague was unconstitutionally obtained by the police in a warrantless search that the State failed to satisfy its burden of proving was obtained by the police in “plain view.”
2. The trial court erred in entering Findings of Fact and Conclusions of Law Re: CrR 3.6 Hearing findings Nos. 1-6; and conclusions Nos. 2, 4-7.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing McKague to be convicted on evidence that should have been suppressed where the evidence used at trial against McKague was unconstitutionally obtained by the police in a warrantless search that the State failed to satisfy its burden of proving was obtained by the police in “plain view?” [Assignments of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

1. Procedure

Ken D. McKague (McKague) was charged by information filed in Thurston County Superior Court with one count of unlawful possession of a controlled substance—greater than 40 grams of marijuana. [CP 3].

Prior to trial the court heard a CrR 3.6 suppression motion, which the court denied. [8-14-06 RP 3-40]. The court entered the following written Findings of Fact and Conclusions of Law Re: CrR 3.6 Hearing:

II. FINDINGS OF FACT

1. The facts are not in dispute.

2. On November 3, 2005, Thurston County Sheriff Detective Rudloff was contacted by Department of Corrections Community Corrections Officer (CCO) Matt Frank. CCO Frank had requested assistance from the sheriff's office in the apprehension of Jay McKague as he had an outstanding DOC warrant for his arrest. Jay McKague is the brother of Ken McKague. The last known address for Jay McKague was 13903 Solberg Rd. SW in Thurston County.
3. Detective Rudloff arrived at 13903 at roughly 10:15 a.m. on November 3, 2005. Det. Rudloff was assisted by other detectives and personnel from DOC. Once at the residence, law enforcement searched the main residence for Jay McKague but did not locate him. The only person at the main residence was the mother of Jay and Ken McKague. She informed detectives that she had not seen Jay that day, but he spends time in a shed behind the main residence. Det. Rudloff asked Ms. McKague if anyone was in the shed and she responded her son, Ken, may be in the shed.
4. Det. Rudloff proceeded to the shed and opened the door to the shed which was roughly 10' x 10'. Det. Rudloff observed, inside the shed, a sofa, dresser, television, computer, and tables with miscellaneous personal items. In the right rear of the shed, Det. Rudloff noticed a 2 foot gap between the side of the sofa and the back of the shed. The gap was covered with a blanket which prevented Det. Rudloff from being able to see between the sofa and the back wall of the shed.
5. Det. Rudloff has had numerous contacts with Jay McKague in which Jay had run or hid from him and/or other law enforcement personnel when they were trying to detain him. Det. Rudloff moved the blanket and observed multiple open bags that contained a substance that he immediately recognized, based upon his training and experience, to be marijuana.
6. Once Det. Rudloff noticed the two bags of marijuana, he left the shed and applied for a telephonic search warrant to

search the shed for marijuana and other drug related paraphernalia. The request for the search warrant was granted and Det. Rudloff (among others) searched the interior of the shed and eventually recovered the suspected marijuana (in excess of 40 grams), additional marijuana located under the originally spotted bags and miscellaneous drug related paraphernalia.

From the above findings of fact, the Court hereby makes the following:

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.
2. The above Findings of Fact are incorporated herein as conclusions of law.
3. Detective Rudloff's testimony was credible.
4. The detectives were lawfully at the residence for the purpose of serving a valid DOC arrest warrant.
5. Detective Rudloff had a subjective belief that Jay McKague could have fit between the side of the couch and the back of the shed. The detectives were lawfully on the premises conducting a search for Jay McKague, when they observed what they immediately recognized as marijuana in "plain view."
6. The discovery of the suspected marijuana was discovered inadvertently while searching for Jay McKague.
7. Defendant's Motion to Suppress, pursuant to CrR 3.6, is hereby denied.

[State's Supp. CP 70-72].

McKague was tried by a jury, the Honorable Richard D. Hicks presiding. McKague had no objections and took no exceptions to the court's instructions. [Vol. II RP 135]. The jury found McKague guilty as charged. [CP 40; Vol. II RP 169-172].

The court sentenced McKague to a standard range sentence of 18-months. [CP 41-51; 9-13-06 RP 8-11].

A notice of appeal was timely filed on September 18, 2006. [CP 54-65]. This appeal follows.

2. Suppression Hearing Facts

On November 3, 2005, Thurston County Sheriff Deputy Tim Rudloff accompanied Department of Corrections (DOC) Community Corrections Officers in serving an arrest warrant for Jay McKague (Jay), McKague's brother. [8-14-06 RP 4-6]. Rudloff and the other officers went to 13903 Solberg Road Southeast, the home of Jay and McKague's mother, who told the officers that Jay was not there. [8-14-06 RP 4-7]. The officers searched her home without obtaining her consent and confirmed that Jay was not inside. [8-14-06 RP 7, 9, 24-25]. They then went to search a shed on the property, again, without obtaining her consent. [8-14-06 RP 7-8, 25]. She did tell them that they may find McKague. [8-14-06 RP 8]. Rudloff went to the shed, found that the door was shut but not locked, entered the shed, and began searching. [8-14-06

RP 10]. The shed appeared as if someone had been living there. [8-14-06 RP 10]. Rudloff moved a blanket wedged between the wall of the shed and a sofa claiming that he was checking to see if Jay was hiding there only to reveal several packages of what appeared to be marijuana. [8-14-06 RP 10, 14-15]. Rudloff then applied for and received a telephonic search warrant. [8-14-06 RP 17-18].

On cross-examination, Rudloff had to admit that the DOC records for Jay indicated that his address was 13849 Solberg Road not his mother's address and that Jay was 6 feet 2 inches tall and weighed 250 pounds—a size making it almost impossible to hide in the space between the sofa and the wall where Rudloff had lifted the blanket and found the marijuana. [8-14-06 RP 21-24].

3. Trial Facts

On November 3, 2005, Thurston County Sheriff Deputies assisted Department of Corrections officer in serving an arrest warrant for Jay, McKague's brother. [Vol. I RP 22-23]. The law enforcement officers went to the home of Jay and McKague's mother. [Vol. I RP 23-25]. Jay was not there, but the officers searched the residence and then searched a shed. [Vol. I RP 25-28]. In the shed in which it appeared someone had been living, the officers found what appeared to be a couple of bags of marijuana hidden under a blanket. [Vol. I RP 28-38]. The officers also

found what could possibly have been a pipe bomb, but turned out to contain what also appeared to be marijuana. [Vol. I RP 39, 44-46, 71-71; Vol. II RP 113-115].

While the officers were searching the shed, McKague arrived stating that he lived there, which was confirmed by items found inside the outbuilding including mail addressed to McKague. [Vol. I RP 52-58, 68-69; Vol. II RP 109-110].

The suspected marijuana was submitted for analysis and determined to in fact be marijuana weighing more than 40 grams. [Vol. I RP 6-15].

McKague did not testify in his defense.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING McKAGUE TO BE CONVICTED BASED ON EVIDENCE THAT SHOULD HAVE BEEN SUPPRESSED WHERE THE EVIDENCE WAS UNCONSTITUTIONALLY OBTAINED BY THE POLICE IN A WARRANTLESS SEARCH THAT THE STATE FAILED TO SATISFY ITS BURDEN OF PROVING WAS OBTAINED BY THE POLICE IN "PLAIN VIEW."

- a. Overview of What Occurred.

On November 3, 2005, Thurston County Sheriffs went to 13903 Solberg Road SE to arrest Jay McKague based on a DOC arrest warrant. [8-14-06 RP 4-6]. The address, 13903 Solberg Road SE, was the home of

Ken McKague, and Jay and Ken's mother. DOC records indicated that Jay McKague's residence was 13849 Solberg Road SE. [McKague's Supp. CP Exhibit No. 15; 8-14-06 RP 22-23]. Officers spoke with Jay and Ken's mother, who told them Jay was not there, and then entered her home without obtaining her consent to search. [8-14-06 RP 7, 9, 24-25]. Not finding, Jay, the officers then searched a shed on the property, again, without obtaining consent to do so, and discovered marijuana. [8-14-06 RP 7-10, 14-15, 25]. A telephonic search warrant was then obtained. [8-14-06 RP 17-18].

b. Applicable Law.

Under Art. 1, sec. 7 of the Washington Constitution warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Khounvichai, 149 Wn.2d 557, 562, 69 P.3d 862 (2003); 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). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71. In each case, the State bears the onerous burden of demonstrating that a warrantless search falls within an exception. State v. Khounvichai, 149 Wn.2d at 562; State v. Parker, 139 Wn.2d at 496.

One exception to the warrant requirement is “plain view.” State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005); State v. Chrisman, 94 Wn.2d 711, 715, 619 P.2d 971 (1980) (Chrisman I). The requirements of plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence—no search for evidence, and (3) immediate knowledge by the officer that he had evidence before him. Id. It is well settled that under Art. 1, sec. 7 of the Washington Constitution, this exception to the warrant requirement is narrower than under the Fourth Amendment. Id. at footnote 4 *citing* State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003) (the second prong, inadvertent discovery, is no longer a requirement to establish the “plain view” exception under the Fourth Amendment).

Under the three prong requirements of the “plain view” exception the first prong is prior justification for the intrusion. Here, the State cannot satisfy its burden on this prong. The State’s prior justification for the intrusion in the instant case is the DOC arrest warrant for Jay McKague, McKague’s brother.

Under the Fourth Amendment, police officers are granted the limited authority to enter a suspect’s residence without consent to make an arrest when the police have reason to believe the suspect is inside and the police have a valid arrest warrant. Payton v. New York, 445 U.S. 573,

602-603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). When the arrestee is a guest in another's residence, the police need to obtain the resident's consent to enter to make the arrest. Steagald v. United States, 451 U.S. 204, 213, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981); State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000); State v. Vy Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002).

Recently, this court, in considering the issue of what is the authority of the police to enter a residence to make an arrest with an arrest warrant, held that the heightened protections afforded by Art. 1, sec. 7 of the Washington Constitution requires the officer have probable cause to believe (1) that the person named in the arrest warrant resides in the home to be entered, and (2) the arrestee is in the home at the time of the entry. State v. Hatchie, 133 Wn. App. 100, 113-114, 135 P.3d 519 (2006). As noted by this court, probable cause in this context means that facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the beliefs. Id.; Sate v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

Here, the evidence at the suppression hearing establishes that the police had a DOC arrest warrant for Jay McKague, McKague's brother and sought to make the arrest authorized by the arrest warrant at 13903

Solberg Road SE. The evidence at the suppression hearing also establishes that Jay McKague's residence, according to DOC, was 13849 Solberg Road SE. Finally, the evidence at the suppression hearing establishes, by its absence, that the officers conducted no investigation establishing that Jay McKague was in fact at 13903 Solberg Road SE when the officers sought to arrest him pursuant to the DOC arrest warrant other than Rudloff's testimony that Jay had been arrested at that address in the past. Applying this court's recent holding to these facts demonstrates that the officers were not justified in entering Jay and Ken McKague's mother's and Ken McKague's residence to arrest Jay McKague even under the authority of a DOC arrest warrant. First, given the disparity in addresses it cannot be said that Jay McKague in fact resided at 13903 Solberg Road SE, and second, that he (Jay) would even be present at that address when the officers arrived. Given this, it was incumbent upon the officers to obtain the mother's consent to search her home and the shed (she was the only person present when the officers arrived), which the officers specifically failed to obtain according the testimony at the suppression hearing, as the evidence establishes no more than Jay was a "guest" in his mother's and brother's (Ken McKague) residence. The DOC arrest warrant for Jay McKague does not insulate the State in this instance of its burden of establishing an exception to the warrant

requirement. The officers had no prior justification for entering the residence at 13903 Solberg Road SE and the shed on the property where Ken McKague was living and their warrantless search resulting in the discovery of incriminating evidence cannot be justified as “plain view.”

The second prong of the “plain view” requirements is inadvertent discovery. Here, again, the State cannot satisfy its burden on this prong.

The testimony at the suppression hearing establishes that the officers opened the shed door, looked inside, entered, and moved a blanket at which point the marijuana fell out. These actions cannot be said to be “inadvertent” as they required the officers to actually search (without a warrant)—open a door rather than view from their vantage point, and move a blanket rather than observe the marijuana from their vantage point. Given these facts the discover of the evidence (marijuana) cannot be said to be “inadvertent.” It is of no matter that the officers were seeking to arrest Jay McKague on a DOC warrant as they were not entitled to do so as argued above, and more importantly had not obtained consent to search, nor had had a warrant to do so.

Finally, the third prong of the “plain view” requirements is immediate recognition of incriminating evidence. The testimony at the suppression hearing indicates that when the marijuana fell out of the blanket that Rudloff did immediately recognize it as incriminating

evidence, but because of the flaws regarding the first two prongs of the “plain view” requirements, this is of no consequence.

The State has failed to satisfy its burden of proof in establishing the “plain view” exception to the warrant requirement that would justify the search of Ken McKague’s shed/home. Simply stated, had the officers investigated and established that Jay McKague in fact was present at the time the DOC arrest warrant was served and in fact lived at 13903 Solberg Road SE, and/or obtained the mother’s consent to search there would be no issue on appeal. The officers having failed to do any of this, any evidence obtained from this unconstitutional search should have been suppressed. The search of the shed was an unconstitutional warrantless search with the result that McKague’s conviction for unlawful possession of a controlled substance (marijuana over 40 grams) cannot stand.

When “an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). The officers conducted an unconstitutional warrantless search that the State has failed to justify under an exception to the warrant requirement. The officers then sought and received a telephonic search warrant based evidence/information improperly obtained during this unconstitutional warrantless search—the search warrant would not have

been granted absent this information—resulting in the discovery of additional evidence. Therefore, all evidence seized as a result of this incident must be suppressed. Wong Sun v. United States, 371 U.S. 471, 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).

McKague’s conviction for unlawful possession of a controlled substance (marijuana over 40 grams) should be reversed and dismissed with prejudice.

c. Trial Court’s Findings and Conclusions.

While it is true, cases on appeal must be decided on the record made in the trial court; only evidence presented in the record can be considered on appeal. Irwin v. State Dept. of Motor Vehicles, 10 Wn. App. 369, 371, 517 P.2d 619 (1974), *citing* State v. Wilson, 75 Wn.2d 329, 450 P.2d 971 (1969); State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). On appeal, the court reviews solely whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court’s conclusions of law. Mairs v. Department of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993). The party challenging the findings bears the burden of demonstrating that the finding is not supported by substantial evidence. Id.

This court must be mindful when evaluating the trial court's findings of fact and conclusions of law that, as argued above, the State has failed to satisfy its onerous burden of proof regarding an exception to the warrant requirement. The trial court's findings and conclusions to the contrary demonstrate its failure to understand that it was in fact the State's burden in this regard and ignore the evidence presented at the suppression hearing.

Finding of Fact No. 1 states that there are no disputed facts when to the contrary there was a dispute based on the suppression hearing evidence as to what in fact was Jay McKague's address, which in turn effected the authority of the officers when attempting to serve the DOC arrest warrant—did the officers have essentially carte blanche authority or were they required to ascertain if Jay was in fact present at 13903 Solberg Road SE at the time and were they required to obtain his mother's consent to search if 13903 Solberg Road SE was not his address. Finding of Fact No. 2 suffers from the same problem in that it states that Jay's address was, contrary to the evidence presented at the suppression hearing, 13903 Solberg Road SE.

Most importantly, all the findings, Findings of Fact Nos. 1-6, fail to set forth that the officers, as Rudloff admitted at the suppression hearing, never obtained Jay and Ken's mother's consent to search. Given

the issue presented at the suppression hearing, whether the State established the “plain view” exception to the warrant requirement, this omission was error.

Finally, the court’s conclusions, particularly incorporating factual findings as conclusions, Conclusions Nos. 2, 4-7, are not supported by the record for the reasons set forth above. This court should reverse and dismiss Ken McKague’s conviction with prejudice.

E. CONCLUSION

Based on the above, McKague respectfully requests this court to reverse and dismiss his conviction for unlawful possession of a controlled substance.

DATED this 19th day of March 2007.

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CERTIFICATE OF SERVICE

07 MAR 19 07 13:31
STATE OF WASHINGTON
BY _____

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of March 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 19th day of March 2007.

Patricia A. Pethick
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