

No. 36133-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Elwyn D. Armstrong,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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Lewis County Superior Court

Cause No. 06-1-00495-1

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Armstrong's motion to suppress items seized from his property.
2. The trial court erred by admitting evidence illegally seized from Mr. Armstrong's property.
3. The trial court erred by entering Conclusion of Law No. 3.1, which reads as follows:

Ferrier warnings were properly given to the Defendant.
Supp CP, Findings of Fact, Conclusions of Law & Order Denying Motion to Suppress Evidence.
4. The trial court erred by entering Conclusion of Law No. 3.2, which reads as follows:

The Defendant voluntarily consented to the search of his property.
Supp CP, Findings of Fact, Conclusions of Law & Order Denying Motion to Suppress Evidence.
5. The trial court erred by entering Conclusion of Law No. 3.3, which reads as follows:

The "Knock and Talk" was legal.
Supp CP, Findings of Fact, Conclusions of Law & Order Denying Motion to Suppress Evidence.
6. The trial court erred by entering Conclusion of Law No. 3.4, which reads as follows:

The evidence was obtained by legal means (the legal "knock and talk")
Supp CP, Findings of Fact, Conclusions of Law & Order Denying Motion to Suppress Evidence.
7. Mr. Armstrong was denied his constitutional right to the counsel of his choice.

8. The trial court erred by refusing to allow appointed counsel to withdraw.
9. The trial court erred by refusing to allow private counsel to substitute for appointed counsel.
10. Mr. Armstrong was denied his constitutional right to represent himself.
11. The trial court erred by failing to inquire when Mr. Armstrong unequivocally asserted his right to represent himself.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Elwyn Armstrong was charged with Manufacture of Marijuana. The prosecution was based on evidence seized by police during a “knock and talk” at Mr. Armstrong’s residence. Mr. Armstrong lived on rural property that was difficult to find. His residence was not visible from the road, and was protected from uninvited visitors by a total of three “No Trespassing” signs. In addition, he had a number of large dogs, which barked when the police drove up the private drive to his residence.

1. Did the police violate Mr. Armstrong’s constitutional right not to be disturbed in his private affairs without authority of law? Assignment of Error Nos. 1-6.
2. Did the police violate Mr. Armstrong’s constitutional right not to have his home invaded without authority of law? Assignment of Error Nos. 1-6.
3. Did the rural setting, the distance from the public roadway, the “No Trespassing” signs, and the large barking dogs eliminate any implication that the access route to Mr. Armstrong’s residence was open to the public? Assignment of Error Nos. 1-6.
4. Was Mr. Armstrong’s consent to search invalid because the police obtained his consent by exploiting their unlawful intrusion onto his property? Assignment of Error Nos. 1-6.

5. Did the trial court err by denying Mr. Armstrong's motion to suppress? Assignment of Error Nos. 1-6.

6. Did the trial court err by admitting evidence seized in violation of Mr. Armstrong's rights under Article I, Section 7 of the Washington State Constitution? Assignment of Error Nos. 1-6.

Shortly before trial, Mr. Armstrong "fired" his attorney, who sought permission to withdraw. The trial court deferred ruling on the motion and gave Mr. Armstrong an opportunity to retain private counsel. When Mr. Armstrong appeared in court the day before trial with private counsel, the trial court summarily denied his request to allow private counsel to substitute, insisting that the case go to trial the following day. The prosecution did not object to the substitution or the delay it would have entailed.

7. Did the trial court violate Mr. Armstrong's constitutional right to his counsel of choice? Assignment of Error Nos. 7-11.

8. Did the trial court err by denying Mr. Armstrong's request to substitute counsel without any inquiry into the surrounding circumstances? Assignment of Error Nos. 7-11.

9. Did the trial court err by denying the request to substitute counsel absent any objection from the prosecution? Assignment of Error Nos. 7-11.

10. Does the denial of Mr. Armstrong's constitutional right to counsel of his choice require reversal even absent a showing of prejudice? Assignment of Error Nos. 7-11.

Mr. Armstrong conveyed to the court his dissatisfaction with appointed counsel on several occasions prior to trial. At one point, through counsel, he unequivocally asked to represent himself. The court affirmed that he had "every right to do that," but made no further inquiry into the request.

11. Did the trial violate Mr. Armstrong's constitutional right to self-representation? Assignment of Error Nos. 7-11.

12. Did the trial court err by failing to inquire into Mr. Armstrong's unequivocal request to represent himself? Assignment of Error Nos. 7-11.

13. Does the denial of Mr. Armstrong's constitutional right to represent himself require reversal even absent a showing of prejudice? Assignment of Error Nos. 7-11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Elwyn Armstrong lives in a remote area of Lewis County, and his residence is not easy to find. RP (1/19/07) 22, 37-38. In order to get to his home, one must drive on a rural highway west of the small town of Morton, then on a dirt road, and then up the private driveway he shares with a single neighbor. The driveway is four-tenths of a mile long, and Mr. Armstrong's home is the second house on the private drive. RP (1/19/07) 21, 38.. RP (1/19/07) 20, 21, 38. Neither his home nor his neighbor's are visible from the dirt road or any road. RP (1/19/07) 29; RP (1/29/07) 9. There are two "No Trespassing" signs posted at the base of the driveway. RP (1/19/07) 41. There is an additional "No Trespassing" sign posted after the first house, at Mr. Armstrong's property line. RP (1/19/07) 39-40; Supp. CP, Exhibit 3 from CrR 3.6 Hearing. Mr. Armstrong owns one or two wolves that he keeps outside on chains, and several dogs that roam unchained. RP (1/19/07) 41, 8, 24, 29-30.

The tip line at the Washington State Patrol received an anonymous call indicating that Mr. Armstrong was growing marijuana at his home. RP (1/19/07) 8. The anonymous tip was passed on to the Lewis County Sheriff's Department, and a team of five officers gathered to do a "knock and talk" with Mr. Armstrong. RP (1/19/07) 9, 23. None of the officers

had been to this home, or to the area, before. RP (1/19/07) 22, 34. They drove their personal vehicles and were all in plainclothes.¹ RP (1/29/07) 2, 12, 17; RP (1/29/07) 18. When the officers, with four vehicles in all, arrived at the property, they drove up the private drive. RP (1/19/07) 23; RP (1/29/07) 5. Mr. Armstrong's wolves and dogs barked quite loudly. RP (1/19/07) 29. Despite this, Deputy Humphrey got out of his car. RP (1/29/07) 3.

Hearing the noise, Mr. Armstrong came out and met the officers in his driveway. RP (1/19/07) 11. At this point, Detective Engelbertson had stepped out of his vehicle. He saw a marijuana plant, which he could not see from his car. RP (1/19/07) 23, 34. The detective told Mr. Armstrong that if he did not consent to a search, the officers would request a warrant. RP (1/19/07) 11. Mr. Armstrong signed the consent form. RP (1/19/07) 14. The officers found multiple marijuana plants inside and outside the residence. RP (1/19/07) 15-16. Mr. Armstrong was charged with Manufacture of a Controlled Substance and Unlawful Use of Drug Paraphernalia to Grow a Controlled Substance. CP 13-14.

¹ A uniformed officer in a marked car appeared later, but left quickly. RP (1/29/07) 12-14.

Mr. Armstrong filed a Motion to Suppress Evidence pursuant to CrR 3.6. Supp. CP. At the evidentiary hearing, the officers testified that they did not notice the “No Trespassing” sign. RP (1/19/07) 23, 34; RP (1/29/07) 4, 17.

The court denied the motion to suppress, and entered Findings of Fact and Conclusions of Law that included the following:

- 3.1 *Ferrier* warnings were properly given to the Defendant.
- 3.2 The Defendant voluntarily consented to the search of his property.
- 3.3 The “Knock and Talk” was legal.
- 3.4 The evidence was obtained by legal means (the legal “knock and talk”.)
Supp CP.

Mr. Armstrong’s appointed counsel first moved to withdraw on February 8, 2007, and told the court that Mr. Armstrong had “fired” him. RP (2/8/2007) 1. The court refused to substitute appointed counsel, but told Mr. Armstrong he could retain private counsel and ask again. RP (2/8/2007) 2. Mr. Armstrong appeared in court on February 15, told the court that he had contacted private counsel and needed to mortgage his property to pay the retainer. RP (2/15/2007) 1. The court confirmed the case for trial, but noted that the trial would likely be “bumped” by a case with higher priority, allowing at least “two days [the following] week to work out the details” of any substitution of counsel. RP (2/15/07) 2. His attorney told the court Mr. Armstrong “again today said he would like to

represent himself. I certainly have no objections” RP (2/15/07) 2. the judge indicated Mr. Armstrong “has every right to do that” and confirmed the case for trial. RP (2/15/07) 2.

Mr. Armstrong appeared with private counsel on February 21. At that time, a different judge, who had not heard the CrR 3.6 hearing or any of the previous motions to substitute counsel announced that the case would go to trial the next day, and denied the motion for substitution:

THE COURT: ...This case is going to trial tomorrow. Are you going to be ready to represent him tomorrow?

MR BRUNDGARDT: No, sir.

THE COURT: Then it’s going to happen. If it’s not --

MR. BRUNDGARDT: I’m not.

THE COURT: No, I am not going to approve the substitution of counsel in that case. This case is set for trial tomorrow. It’s going to trial tomorrow. That is just the way it’s going to be.

MR BRUNDGARDT: I understand.

RP (2/21/07) 15.

Mr. Armstrong’s appointed counsel put on the record his own request to withdraw:

...MR. UNDERWOOD: I’d like to put on the record, Your Honor, that I have great difficulty with my client. He has great difficulty with me. To be honest with you, he has no faith in me and I have no faith in him. I’d ask you to approve it. I understand that—

THE COURT: Well, it appears to me that what this comes down to is that your client doesn’t like the ruling that Judge Hall made. I mean, that’s —

MR. UNDERWOOD: I don’t think that’s necessarily the case, Your Honor. I’ve explained Judge Hall’s ruling. To be honest with you, I disagree. I don’t think it’s that he doesn’t like Judge Hall’s ruling.

...Again, Your Honor, in the strongest terms I just think you're making a big mistake. I'm sorry if you take personal offense.
THE COURT: I don't.
RP (2/21/07) 15-17.

At the start of the jury trial, appointed counsel renewed the motion to substitute counsel. RP (2/22/07) 20-21. The court again denied the motion without argument or colloquy with Mr. Armstrong. RP (2/22/07) 21.

Mr. Armstrong was convicted as charged and sentenced. CP 4-12. This timely appeal followed. CP 3.

ARGUMENT

I. THE OFFICERS' INITIAL ENTRY ONTO MR. ARMSTRONG'S PROPERTY VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.

Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. The Supreme Court has stated that "it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999). Under Article I, Section 7, warrantless searches are unreasonable *per se*. *Parker*, at 494. Exceptions to the warrant requirement are limited and narrowly drawn. *Parker*, at 494.

The state, therefore, bears a heavy burden to prove that a warrantless search falls within an exception. *Parker*, at 494.

One exception to the warrant requirement is where the search is performed pursuant to lawfully obtained consent. *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005). But consent searches must be closely scrutinized to ensure they pass constitutional muster. Avoidance of the warrant requirement through consent searches

...flies in the face of [the Supreme Court's] admonition that "[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so." *State v. Ferrier*, 136 Wn.2d 103, at 115, 960 P.2d 927 (1998), quoting *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989), citation omitted.

The danger in permitting consent searches to go unexamined stems from the fact that

...unlike a search warrant, a search resulting from [consent] need not be supported by probable cause, or even reasonable suspicion, and the constitutionality of the search might otherwise only be reviewed, if ever, months *after* the search was conducted at an optional CrR 3.6 suppression hearing. Moreover, unlike a search based upon a warrant, the scope of a consensual search is often not limited to specific areas. *Ferrier*, at 118.

Consent obtained through exploitation of a prior illegality may be invalid, even if voluntarily given. *State v. Soto-Garcia*, 68 Wn. App. 20 at 27, 841 P.2d 1271 (1992). Several factors are relevant in determining whether consent is tainted by a prior illegality: (1) the time elapsed

between the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the administration of *Miranda* warnings. *State v. Armenta*, 134 Wn.2d 1 at 17, 948 P.2d 1280 (1997), *citing Soto-Garcia, supra*.

The Washington Constitution's protection against government intrusion into private affairs is strongest where a person's home is concerned. *State v. Ross*, 141 Wn.2d 304 at 312, 4P.3d 130 (2000). A police officer may not intrude on private property unless it is impliedly open to the public. *State v. Littlefair*, 129 Wn. App. 330 at 344, 119 P.3d 359 (2005). Although direct access routes to a residence are generally open to the public, the homeowner may restrict access. *State v. Ridgway*, 57 Wn. App. 915, 790 P.2d 1263 (1990). In *Ridgway*, this Court concluded that

the undisputed physical facts [did] not allow the inference that Ridgway opened his property to uninvited visitors. The house [was] located in an isolated setting, hidden from the road and from neighbors. The long driveway [was] blocked by a closed gate, demonstrating a subjective expectation of privacy in the area beyond the gate. Moreover, barking guard dogs stationed at the nearest door warned uninvited visitors that they were not welcome. *Ridgway*, at 918-919, *citations omitted*.

This Court reached a similar conclusion in *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994): "Here, as in *Ridgway*, the access way

to the property was not open, the Johnsons manifesting their subjective intent to close their property by fencing it, erecting a gate, and placing signs near the gate saying 'No Trespassing' and 'Private Property.' ” *Johnson*, at 706.

Here, the officers unlawfully intruded on private property. Although they followed the access route to Mr. Armstrong’s residence, that access route was not impliedly open to the public. Instead, Mr. Armstrong had clearly evidenced his desire not to be bothered by uninvited visitors. First, he lived in a rural area west of the small town of Morton, in Lewis County. RP (1/19/07) 20. As this Court has noted, “people move to rural areas to obtain more privacy.” *Littlefair*, at 343. The private drive he shared with a neighbor was off a dirt road maintained by the county, and the officers described the place as difficult to find; the residence was apparently not visible from the roadway. RP (1/19/07) 22, 29.

Second, Mr. Armstrong protected his property with a “No Trespassing” sign that was posted at his property line. The sign was visible from the private road shortly after the private road passed by Mr. Armstrong’s neighbor’s house. The sign included his signature and phone number. In addition, two other “No Trespassing” signs installed by his

neighbor were posted and visible “at the bottom of the hill.” RP (1/19/07) 41.

Third, Mr. Armstrong had one or two large wolves chained up near his house. More large dogs roamed free on the property near the house. The dogs barked when the officers approached. RP (1/19/07) 8, 24, 29-30, 41; Supp. CP.

Under these circumstances, the access route was not impliedly open to the public, and the officers’ intrusion onto Mr. Armstrong’s property violated his constitutional rights under Wash. Const. Article I, Section 7. *Ridgway, supra; Johnson, supra*. This invalidated the officers’ view of a marijuana plant, their threat to obtain a warrant, and the consent they ultimately extracted from Mr. Armstrong. Because of this, the evidence should have been suppressed. *Armenta, supra*. The conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Armenta, supra*.

II. THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF HIS CHOICE.

The Sixth Amendment affords a criminal defendant the right to be represented by his or her counsel of choice. *United States v. Gonzalez-Lopez*, 165 L.Ed. 2d 409, 74 U.S.L.W. 4453, 126 S. Ct. 2557 (2006). The Sixth Amendment commands “not that a trial be fair, but that a particular

guarantee of fairness be provided--to wit, that the accused be defended by the counsel he believes to be best.” *Gonzalez-Lopez*, 126 S. Ct. at 2562. The U.S. Supreme Court has described the right to counsel of choice as “the root meaning of the constitutional guarantee.” *Gonzalez-Lopez*, 126 S. Ct. at 2563. A violation is complete if the accused is denied the right to counsel of choice; no additional showing of prejudice is required. *Gonzalez-Lopez*, 126 S. Ct. at 2562. The “erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as “structural error,” ’ ” and is therefore not subject to harmless error analysis. *Gonzalez-Lopez*, 126 S. Ct. at 2564.

The right to counsel is not absolute, and may be denied where its exercise would *unduly* delay proceedings. *State v. Roth*, 75 Wn. App. 808 at 824, 881 P.2d 268 (1994), *emphasis added*. Although trial courts have broad discretion in this area, “an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’” violates the defendant’s Sixth Amendment right. *Roth* at 824 (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616-17, 75 L.Ed.2d 610 (1983) (and *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed.2d 921 (1964))).

The trial court must balance the defendant's interest in having her or his counsel of his choice against the public's interest in the prompt and efficient administration of justice. *Roth*, at 824. Whether or not a continuance is reasonable depends on all the surrounding facts and circumstances. *Roth, supra*. Some of the factors which may be weighed by the trial court are set forth in *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978).²

These factors include: (1) the length of the requested delay; (2) whether other continuances have been requested and granted; (3) the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; (4) whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstances which give rise to the request for a continuance; (6) whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; (7) whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; (8) the

² *Burton* was discussed with approval by the *Roth* court. See *Roth, supra*, at 825.

complexity of the case; and other relevant factors which may appear in the context of any particular case. *State v. Burton, supra*.

Here, it is clear that the trial judge, who had not presided over the pretrial proceedings leading up to the trial, failed to engage in any meaningful analysis whatsoever. Without inquiring into any of the factors set forth in *Burton, supra*, the court announced that the case “is going to trial tomorrow,” and summarily denied the request for substitution. RP (2/21/2007) 15. The prosecution had not objected to Mr. Armstrong’s request, and there was no indication that a delay would inconvenience the state or any of its witnesses. RP (2/18/07) 1-3; RP (2/15/07) 1-3; RP (2/21/07) 15-18; RP (2/22/07) 21. The only reason for the denial that appears in the record is the trial judge’s blind insistence that the case would go to trial the following day. RP (2/18/07) 1-3; RP (2/15/07) 1-3; RP (2/21/07) 15-18; RP (2/22/07) 21.

The trial court abused its discretion by ignoring the circumstances surrounding the request, including appointed counsel’s statement “in the strongest terms” that the court was “making a big mistake.” RP (2/21/07) 17. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Roth, supra*.

III. THE TRIAL COURT VIOLATED MR. ARMSTRONG'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

The State and Federal Constitutions guarantee a criminal defendant the right to self-representation. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Section 22; *State v. Vermillion*, 112 Wn.App. 844 at 850, 51 P.3d 188 (2002). The right is afforded despite the potential for detriment to the accused's best interests and to the administration of justice. *Vermillion*, at 850. A defendant need not demonstrate technical knowledge of the law and the rules of evidence in order to represent herself or himself. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right is either respected or denied; its deprivation cannot be harmless. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). A denial of the right occurs even when the judge refusing a request for self-representation is attempting in good faith to protect the accused's best interests. *Vermillion* at 857.

In this case, Mr. Armstrong, through his court appointed counsel, unequivocally asserted his right to represent himself. RP (2/15/2007) 2. The trial court responded that "[h]e has every right to do that," but then ignored the request. The court's failure to inquire further into Mr. Armstrong's request to represent himself requires reversal. RP (2/15/07)

1-3; *Vermillion, supra*. The conviction must be vacated, and the case remanded to the trial court for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Armstrong's conviction must be reversed. The evidence must be suppressed, and the case dismissed with prejudice. In the alternative, the case must be remanded to the Superior Court for a new trial.

Respectfully submitted on July 30, 2007.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON
BY JR
DEPUTY

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

Lewis County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 30, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 30, 2007.



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