

No. 36133-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Elwyn D. Armstrong,**

Appellant.

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FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB -4 PM 1:31  
STATE OF WASHINGTON  
BY WR  
DEPUTY

Lewis County Superior Court

Cause No. 06-1-00495-1

The Honorable Judge Nelson E. Hunt

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE WARRANTLESS ENTRY ONTO MR. ARMSTRONG'S PROPERTY VIOLATED HIS RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 OF THE STATE CONSTITUTION.**

In order to reach Elwyn Armstrong's secluded residence to investigate an anonymous tip, five plainclothes police officers drove up the "mountain" where he lived, following an isolated dirt road. They then continued an additional 4/10 of a mile on Mr. Armstrong's private driveway. On the way, they passed three no-trespassing signs— two at the base of the driveway, and a third at Mr. Armstrong's property line partway up the driveway. When they reached his difficult-to-find house at 5:30 in the evening, they saw his two wolves chained up, and other dogs roaming free. The wolves and dogs barked upon their arrival. RP (1/19/07) 6-48; RP (1/29/07) 1-30. Respondent claims that this evening trek—along the remote and rural dirt road, nearly a half-mile up the driveway, past three no-trespassing signs, and into the yard where Mr. Armstrong's barking wolves and dogs were located—was no more an intrusion than a reasonably respectful citizen might make. Brief of Respondent, p. 6. Respondent also argues that the "No Trespassing" signs are not by themselves sufficient to require suppression. Brief of Respondent, p. 8-11.

The remote rural setting, the primitive road, the lengthy private driveway,<sup>1</sup> and the barking wolves and dogs were sufficient—especially when combined with the three no-trespassing signs—to defeat a warrantless entry. *See, e.g., State v. Jesson*, \_\_\_ Wn. App. \_\_\_ at \_\_\_, \_\_\_ P.3d \_\_\_, 2008 Wash. App. LEXIS 226 (2008) (“While the ‘No Trespassing’ signs alone are not sufficient to remove implied consent to the access of the property via the driveway, the closed gate, the primitive road, the secluded location of the home in addition to the posted signs are sufficient.”)

Respondent apparently concedes that Mr. Armstrong’s consent was not independent of the initial entry. Accordingly, the intrusion without a warrant was unlawful and tainted the consent. The officers’ observations and the items obtained following their intrusion should have been suppressed. *State v. Ross*, 141 Wn.2d 304 at 312, 4P.3d 130 (2000); *State*

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<sup>1</sup> Respondent suggests that the fact that the lower portion of Mr. Armstrong’s private driveway was shared with one other residence removes any impediment to entry. Brief of Respondent, p. 9, 10, *citing State v. Chaussee*, 72 Wn.App. 704, 866 P.2d 643 (1994). But *Chaussee* is a Fourth Amendment case in which Article I, Section 7 was not raised. Furthermore, multiple residents shared the driveway in *Chaussee*, the entire length was apparently open to all the neighbors, and the signs were posted on someone else’s property. Here, by contrast, Mr. Armstrong shares his private driveway with only one neighbor, whose property is closer to the road than his; thus the upper portion of his driveway is exclusively his, and he does have the ability to exclude others. Furthermore, Mr. Armstrong’s neighbor apparently shared a desire for privacy, as evidenced by the presence of two “No Trespassing” signs at the bottom of the driveway. RP (1/19/07) 37-41.

*v. Littlefair*, 129 Wn. App. 330 at 344, 119 P.3d 359 (2005); *State v. Ridgway*, 57 Wn. App. 915, 790 P.2d 1263 (1990).

**II. THE TRIAL COURT DENIED MR. ARMSTRONG HIS RIGHT TO COUNSEL OF CHOICE BY INSISTING THAT TRIAL PROCEED WITHOUT BALANCING THE CIRCUMSTANCES UNDER WHICH THE REQUEST WAS MADE.**

A court may only deny an accused the right to counsel of choice where substitution of counsel would *unduly* delay proceedings; the right is denied by “an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay.’” *State v. Roth*, 75 Wn. App. 808 at 824, 881 P.2d 268 (1994) (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)). Respondent applies the wrong legal standard by arguing that any delay is sufficient to deny an accused’s request. Brief of Respondent, p. 12. This is simply incorrect. *Roth, supra*.

Respondent fails to address any of the factors raised in Appellant’s opening brief. *See* Appellant’s Opening Brief, at pp. 11-12. The trial judge insisted on proceeding with trial, and failed to balance the defendant’s right to counsel of choice against the public’s right to the prompt administration of justice. RP (2/8/07) 1-3; RP (2/21/07) 15-18. The trial court abused its discretion by failing to weigh the circumstances.

Mr. Armstrong's 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.**

Mr. Armstrong made an unequivocal request to represent himself on February 15. Although his preference would have been to obtain private counsel, he was adamant about continuing without the assistance of Mr. Underwood. RP (2/8/07) 1-3; RP (2/15/07) 1-3; RP (2/21/07) 15-18. He did not indicate that he needed additional time to prepare, if permitted to represent himself. The trial court acknowledged Mr. Armstrong's right to represent himself, but took no further steps to permit him to do so. RP (2/8/07) 1-3; RP (2/15/07) 1-3; RP (2/21/07) 15-18. Under these circumstances, reversal is required. 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).

**CONCLUSION**

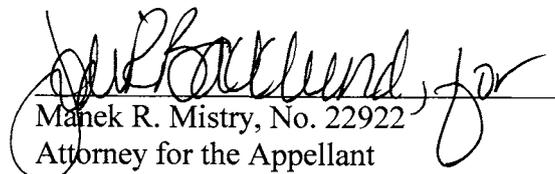
Mr. Armstrong's conviction must be reversed. Because law enforcement violated his right to privacy under Article I, Section 7 of the Washington Constitution, the evidence must be suppressed and the case dismissed with prejudice. In the alternative, because the trial judge

infringed Mr. Armstrong's constitutional rights to counsel of choice and to self-representation, the case must be remanded to the Superior Court for a new trial.

Respectfully submitted on February 2, 2008.

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CERTIFICATE OF MAILING

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

Elwyn D. Armstrong  
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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 February 2, 2008.

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 February 2, 2008.

  
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