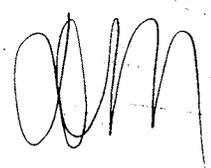


363593-II
No. 36362-3-II



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Stephanie Alvarez,

Appellant.

Jefferson County Superior Court

Cause No. 06-8-00065-1

The Honorable Judge Pro Tem James Bendell

Respondent's Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Stephanie Alvarez was charged with MIP. CP 42-43. Following an evidentiary hearing on Ms. Alvarez's motion to suppress, the trial judge granted the motion and issued a Memorandum Opinion that included the following statement of facts:

Defendants are charged with the crime of Minor in Possession. These charges arose after police officers received a tip concerning an underage drinking party at a home owned by Dean Lebens and which is located at 5111 Hendricks Street in Port Townsend. As part of their response to the alleged crime scene the investigating officers passed through the gate of a structure which the prosecution refers to as a fence, the defense refers to as a wall, but which, in the interests of neutrality, the court will refer to as enclosure [sic] for purposes of this opinion.

The enclosure is between six to ten feet high and is made of concrete and stucco, and has somewhat the appearance of the California Mission style architecture. The enclosure must be accessed through one of three decorative arched doors. A doorbell has been installed on the outside of the enclosure. Mr. Lebens testified that mail and packages are delivered on the outside of the enclosure. He further testified that members of the Jehovah's Witness religion do not come through the gates but instead leave religious pamphlets on the outside of the enclosure. Mr. Lebens also testified that, in mild weather, members of his family sometimes sleep outside within the area circumscribed by the enclosure. The Lebens home and the enclosure were not built at the same time.

The police testified that they heard loud music and smelled alcohol coming from the scene. They also testified that it was possible to see some portion of the enclosed area through air spaces that were incorporated into the structure of the enclosure. They further testified that they knocked on one of the gates but received no response. They then went to a second gate and again knocked on the gate and received no response after announcing

their presence. They then opened the gate and entered the area circumscribed by the enclosure.
CP 49-51.

The trial court concluded that the officers violated Ms. Alvarez's reasonable expectation of privacy:

It is the court's opinion that a "reasonably respectful citizen" would not pass through the gated enclosure without permission of the occupants. It was the unrebutted testimony that all salesmen and solicitors do not pass through the gates without permission. Moreover, the existence of a doorbell on the outside of the enclosure clearly sends the message that visitors are to ask permission to enter. Finally, the fact that the police knocked on the gates before entering is in itself strongly suggestive of the fact that the visual impact of the enclosure, including its height, width and breadth, do [sic] not invite entry without permission. One cannot, for example, imagine a doorbell on the exterior of the proverbial white picket fence. The fact that the enclosure was built some years after the original house is of little relevance. If the owner added an additional bedroom to the house after several years, that bedroom would be entitled to no less privacy than the original structure.
CP 49-51.

After denying a motion for reconsideration, the court entered findings of fact, which read, in relevant part, as follows:

- ...2. The officers responded to the scene by passing through the gate of a 6 to 10 foot high enclosure surrounding the residence. The enclosure must be accessed through one of three decorative arched doors. A doorbell has been installed on the outside of the enclosure.
3. Mail and packages are delivered on the outside of the enclosure.
4. Members of the Levins [sic] family sometimes sleep outside within the area circumscribed by the enclosure.
5. As the police approached, they heard loud music and smelled alcohol coming from the area. It was possible to see some

portion of the enclosed area through air spaces that were incorporated into the structure of the enclosure.

6. They knocked on one of the gates but received no response. They then went to a second gate and again knocked on the gate. Receiving no response after announcing their presence, they opened the gate and entered that area circumscribed by the enclosure.
CP 58-59.

Based on these findings, the court made the following conclusions

of law:

1. The resident of 5111 Hendricks Street and his invitees had a reasonable expectation of privacy in the area located within the enclosure.
2. A “reasonable respectful citizen” would not pass through the gated enclosure without the permission of the occupants, as the visual impact of the enclosure does not invite entry without permission
3. The police officer’s entry into the enclosed area without a search warrant or permission of the owner constitutes a substantial and unreasonable departure from the impliedly open area and constitutes a constitutionally prohibited invasion of privacy.
4. Evidence obtained following law enforcements’ illegal entry is excluded.
CP 58-59.

The court determined that its decision “eviscerated” the state’s case and dismissed the prosecution. Order of Dismissal With Prejudice, CP 60. The state appealed.

ARGUMENT

THE TRIAL COURT’S UNCHALLENGED FINDINGS ESTABLISH THAT THE WARRANTLESS ENTRY VIOLATED THE STATE AND FEDERAL CONSTITUTIONS.

The Fourth Amendment to the Federal Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

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.

Police officers may not enter the curtilage of a house unless they remain in areas impliedly open to the public; a substantial and

unreasonable departure from such areas exceeds the scope of the implied invitation. *State v. Dyreson*, 104 Wn.App. 703 at 710-711, 17 P.3d 668 (2001). A police officer on legitimate business may only go where a “reasonably respectful citizen” would go. *Dyreson*, at 711.

Unchallenged findings of fact are verities on appeal, and an appellate court reviews only those facts to which the appellant has assigned error. *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59, (2006). Where a memorandum opinion outlines facts established at a CrR 3.6 hearing, failure to assign error to those facts precludes review of those facts. *State v. Balch*, 114 Wn. App. 55 at 58, 55 P. 3d 1199 (2002). Furthermore, the trier of fact is in a better position than an appellate court to assess the credibility of witnesses and take evidence. *State v. Lawson*, 135 Wn. App. 430 at 439, 144 P.3d 377 (2006); *see also State v. Valentine*, 132 Wn.2d 1 at 23, 935 P.2d 1294 (1997) (“Resolution of factual disputes is a task for the trier of fact, not this court.”) An appellate court may affirm a lower court’s decision for reasons not cited by the lower court, if the record is sufficiently developed. RAP 2.5(a); *Plein v. Lackey*, 149 Wn.2d 214 at 222, 67 P.3d 1061 (2003).

In this case, the trial court set out the facts in a Memorandum Opinion dated January 19, 2007, and in Findings of Fact entered on May 24, 2007. The Appellant has not assigned error to any of the facts recited

in these documents. Appellant's Opening Brief, p. iv. Accordingly, the trial court's recitation of the facts is not subject to review. *Balch, supra*; *Valentine, supra*.

The trial court found the enclosure to be six to ten feet high and made of concrete and stucco, with a doorbell on the outside. Memorandum Opinion, CP 49. According to the court, "the visual impact of the enclosure, including its height, width, and breadth, do [sic] not invite entry without permission." Memorandum Opinion, CP 50-51. Unrebutted testimony established that delivery people, salespeople, and other uninvited visitors never entered the enclosure without permission. Memorandum Opinion, CP 50. Furthermore, the family sometimes slept outside, within the enclosure. Memorandum Opinion, CP 50. Finally, the police knocked on two of the gates and announced their presence before entering without permission, and the court found this indicative of the enclosure's purpose. Memorandum Opinion, CP 50-51.

Based on these unchallenged facts, the trial court's decision must be affirmed. The physical layout of the residence and its enclosure clearly indicate the family's intent to prevent uninvited members of the public from entering, and this was the effect it had. By entering without permission, the police officers violated Ms. Alvarez's reasonable expectation of privacy and intruded on her private affairs. Accordingly,

the warrantless entry violated the Fourth Amendment and Article I, Section 7 of the Washington State Constitution. The trial court's order suppressing the evidence and dismissing the case with prejudice must be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's order suppressing the evidence and dismissing the case with prejudice must be affirmed.

Respectfully submitted on November 16, 2007.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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

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and to:

Thomas Weaver
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and to:

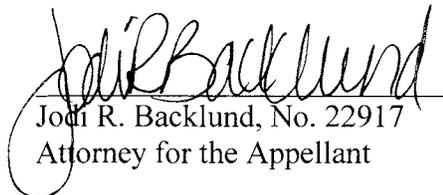
Jefferson County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 17, 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 November 16, 2007.


Jodi R. Backlund, No. 22917
Attorney for the Appellant