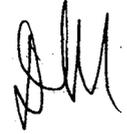


No. 36359-3-II



COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ASHLEY PARKER

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

A. Counterstatement of Assignments of Errors.....1

B. Statement of Facts.....1

C. Argument.....2

D. Conclusion.....5

TABLE OF AUTHORITIES

Cases

<u>State v. Cheatam</u> , 112 Wn. App. 778, 51 P.3d 138 (2002).....	2
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	3
<u>State v. Seagull</u> , 95 Wn.2d 898, 902, 632 P.2d 44 (1981).....	3
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	3

A. Counterstatement of Assignments of Errors

Counterstatement of Assignments of Errors

1. Should this Court treat as verities the findings of fact of the trial court when the appellant has failed to assign error to any of the findings?

2. Based upon these uncontested findings of fact, did the trial court correctly conclude that the police made an unreasonable, warrantless entry into 5111 Hendricks Street?

B. Statement of Facts

Respondent Ashley Parker was charged by Information in Jefferson County Juvenile Court with being a minor in possession of alcohol (MIP). CP, 1. Prior to trial, Ms. Parker filed a motion to suppress evidence of the observations of the police officer. CP, 7. The trial court granted the motion, suppressed the evidence, and dismissed the case. CP, 39. In support of the order of suppression, the trial court entered a Memorandum Opinion and Findings of Fact and Conclusions of Law. CP, 18-20 & 37-38. Ms. Parker incorporates by reference the Memorandum Opinion and Findings of Fact and Conclusions of Law without exception. The State filed a notice of appeal.

C. Argument

When reviewing a suppression motion, this Court must determine whether substantial evidence supports the trial court's findings and whether those findings support its conclusions of law. This Court considers any fact that is not objected to a verity on appeal. Conclusions of law are reviewed de novo. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002).

In this case, the trial court entered both a Memorandum Opinion and Findings of Fact and Conclusions of Law. The State has not assigned error to any of the findings of fact. They are, therefore, verities on appeal. In addition, they are all supported by substantial evidence. Based upon the trial court's findings, and the State's failure to assign error to any of them, this Court should treat as verities the following facts:

- (1) Ms. Parker was inside a home located at 5111 Hendricks Street in Port Townsend;
- (2) 5111 Hendricks Street is surrounded by an enclosure that is six to ten feet high and made of concrete and stucco, with the appearance of the California Mission style architecture, which was built at a different time than the residence;
- (3) The enclosure must be accessed by one of three decorative arched doors, at least one of which has a doorbell;
- (4) Mail and packages are delivered to the outside of the enclosure;
- (5) Religious proselytizers, such as Jehovah Witnesses, leave religious pamphlets outside the enclosure;
- (6) Occupants of 5111 Hendricks Street sometimes sleep in the area circumscribed by the enclosure.

CP, 18-20. In addition, although the trial court made not specific findings regarding this fact, it is uncontested that the time of the entry into the enclosure was at 11:10 p.m. CP, 4.

The police entered this enclosure without a warrant or consent. Inside they encountered Ms. Parker and made observations about her. Based upon these observations, Ms. Parker was charged with MIP.

The Fourth Amendment and article 1, section 7 of the Washington Constitution recognize that people have a high expectation of privacy in their homes. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). This includes the curtilage around the home. State v. Ross, 141 Wn.2d 304, 4 P.3d 130 (2000). A warrantless entry into a residence or the curtilage thereof is per se unreasonable unless it falls within one of the recognized exceptions. Id.

The rule for when police may enter the curtilage of a home was described by the Supreme Court in Ross:

[I]t is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house.

Ross at 312, citing State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). In suppressing the evidence in Ross, the Court concentrated on

two primary issues. First was the hour of the day. In Ross, the Court was of the opinion that a reasonable, respectable citizen would not approach a home at 12:10 a.m. Second, the Court believed that the purpose of the contact was to obtain evidence based upon an anonymous tip, and not for legitimate business.

In Ms. Parker's case, the police approached the residence at 11:10 p.m. There is not a material difference between the 11:10 p.m. approach in Ms. Parker's case and the 12:10 a.m. approach at issue in Ross. Both are unreasonable approaches. Additionally, like in the Ross case, the officers approached the residence in response to an anonymous tip for the purpose of gathering evidence, not for legitimate business.

But there is another, more significant, factor present in Ms. Parker's case that was not at issue in Ross. In Ross, the trial court found that the police used the most direct route available, and the Supreme Court concluded that this finding was supported by substantial evidence. In Ms. Parker's case, the trial court found that the police did not use the most direct route available and this conclusion is both supported by substantial evidence and a verity on appeal. While the Ross case recognizes the right of police officers to use normal "access routes" to approach a residence, the trial court concluded in this case that "salesmen and solicitors do not pass through the gates without permission." CP, 19. The trial court also

noted the presence of a doorbell outside the gate and the fact that the police knocked on the gates prior to the warrantless entry. As the trial court ruminated, one does not “imagine a doorbell on the exterior of the proverbial white picket fence.” CP, 20. In sum, the police illegally entered the curtilage, if not the actual residence, of 5111 Hendricks Street and the observations of the officers inside were properly suppressed.

D. Conclusion

The trial court should be affirmed.

DATED this 3rd day of December, 2007.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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BY: [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) Case No: 06-8-00063-4
) Court of Appeals No: 36359-3-II
 Plaintiff/Respondent,)
) AFFIDAVIT OF SERVICE
 vs.)
)
 ASHLEY PARKER,)
)
 Defendant/Appellant.)

STATE OF WASHINGTON)
)
 COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
and competent to be a witness.

On December 3, 2007, I sent an original and copy, postage prepaid, of the BRIEF OF
RESPONDENT, to the Washington State Court of Appeals, Division II, 950 Broadway, Suite
300, Tacoma, WA 98402.

ORIGINAL

1 On December 3, 2007, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT,
2 to the Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend, WA 98368.

3 On December 3, 2007, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT,
4 to Ms. Ashley Parker, P.O. Box 1815, Port Townsend, WA 98368.

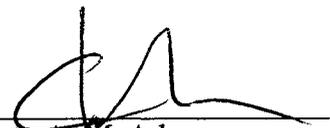
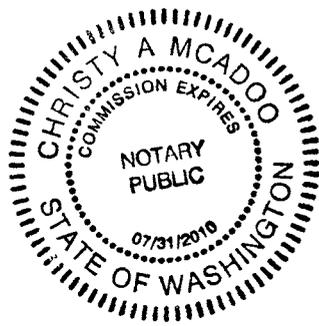
5 On December 3, 2007, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT,
6 to Backlund and Mistry, 203 East Fourth Avenue, Suite 404, Olympia, WA 98501.

7
8 Dated this 3rd day of December, 2007.



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10
11 Thomas E. Weaver
12 WSBA #22488
13 Attorney for Defendant

14 SUBSCRIBED AND SWORN to before me this 3rd day of December, 2007.



15
16 Christy A. McAdoo
17 NOTARY PUBLIC in and for
18 the State of Washington.
19 My commission expires: 7/31/10
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