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COURT OF APPEALS
DIVISION II

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NO. 36768-8-II

STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY NEWHOUSE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt

BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

The trial court determined that the police violated Mr. Newhouse's constitutional rights when they entered his secluded rural property without a warrant, to conduct a criminal investigation of Mr. Newhouse. Without judicial authorization, police went onto Mr. Newhouse's private property, past two "No Trespassing" signs posted on either side of the driveway, past a gate, and down an approximately 600 foot long, winding, heavily wooded private driveway to a residence that is not visible from any public area or any neighboring private property. The trial court's findings are supported by substantial evidence of these facts, and under several cases considered and cited by the trial court, these facts evince a violation of Washington Constitution article 1 § 7. This court should affirm the trial court's ruling.

B. RESPONSES TO ASSIGNMENTS OF ERROR

1. The trial court correctly suppressed the evidence obtained as a result of the police entry onto Mr. Newhouse's property.

2. The trial court correctly granted the defense motion to dismiss.

3. The trial court's Finding of Fact 1.2 is supported by substantial evidence in the record and must be upheld.

4. The trial court's Finding of Fact 1.6 is supported by substantial evidence in the record and must be upheld.

5. The trial court's Conclusion of Law 3.1 is fully supported by persuasive and controlling authority.

6. The trial court's Conclusion of Law 3.3 is fully supported by persuasive and controlling authority.

7. The trial court's Conclusion of Law 3.4 is fully supported by persuasive and controlling authority.

8. The trial court's Conclusion of Law 3.5 is fully supported by persuasive and controlling authority.

9. The trial court's Conclusion of Law 4.1 is fully supported by persuasive and controlling authority.

C. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did law enforcement possess lawful authority under Washington Constitution article 1, § 7 to continue past two "No Trespassing" signs, a gate, and down a 600 foot long, winding, wooded driveway to a residence that could not be seen from anywhere else for the purpose of conducting a criminal investigation? (Responses to Assignments of Error 1-9.)

2. Does the desire to conduct a criminal investigation of a homeowner via a "knock and talk" procedure provide lawful authority under Washington Constitution article 1, § 7 to continue past two "No

Trespassing” signs, a gate, and down a 600 foot long, winding, wooded driveway to a residence that could not be seen from anywhere else?

(Responses to Assignments of Error 1-9.)

3. Is a home impliedly open to the public when it is clearly marked with two “No Trespassing” signs, a gate stands at the entrance of the driveway, the driveway is about 600 feet long, winding, and heavily wooded, and the home cannot be seen from the driveway entrance, from any public property, or from any neighbor’s property? (Responses to Assignments of Error 1-9.)

4. Has the state failed to present argument or authority in support of Assignment of Error 2, in which it assigns error to Finding of Fact 1.2? (Responses to Assignments of Error 3.)

D. STATEMENT OF THE CASE

1. Evidence at the Suppression Hearing. At the suppression hearing, Detective Engelbertson testified that he wished to question Mr. Newhouse about criminal activity he suspected Mr. Newhouse might be involved with at his property. RP 4-5.¹ For this reason he decided to go to Mr. Newhouse’s residence to talk with him. RP 5. Det. Engelbertson coordinated this investigation with several other officers, meeting at a

¹ The Verbatim Report of Proceedings consists of several transcripts, only one of which will be referenced here, the CrR 3.6 hearing of July 25, 2007. It shall be referred to hereafter as “RP” followed by a page designation.

Exhibits 3, 5-7. Ms. Roberts explained that aside from using the Newhouse driveway, the only way to get to the Newhouse residence is to trespass on her private property and go “cross country” through the woods. RP 26. While the state’s evidence did not address whether Mr. Newhouse’s residence was visible from any other private property, the state’s response brief concedes that Detective Engelbertson told the court that the Newhouse residence was not visible from any public property. BOR at 2. See Exhibits 5, 7.

Mr. Newhouse told the court that he always closed the gate, and that he heard the clank of the gate’s chain right before Detective Engelbertson appeared on his property. RP 33. When Mr. Newhouse saw Detective Engelbertson, who “looked like a SWAT officer” and called him by name on his own property, Mr. Newhouse approached Detective Engelbertson to greet him. RP 33-34. Detective Engelbertson did not allow Mr. Newhouse to approach and greet him, instead ordering him to stop by holding up his hand in a “stop” gesture. RP 33-34. Mr. Newhouse obeyed Detective Engelbertson’s order. RP 34. From that point on, Mr. Newhouse told the court, “I was under his direction,” and he did not feel he had the option to refuse to answer Detective Engelbertson’s questions or to leave. RP 35, 40. Detective Engelbertson interrogated Mr. Newhouse about marijuana activity at his property and told Mr. Newhouse

nearby staging area and planning the sequence of their entry to Mr. Newhouse's property. RP 5, 16, 19-20.

Det. Engelbertson told the trial court that he had seen the "No Trespassing" signs at the entrance to Mr. Newhouse's driveway, yet he went past them. RP 6-7; Exhibits 2, 4, 6. He saw the gate at the entry but stated it was open, and saw that Mr. Newhouse's driveway was "a couple hundred yards long." RP 7, 10. He spoke to Mr. Newhouse in front of Mr. Newhouse's trailer, and did not Mirandize Mr. Newhouse.² During this questioning, Mr. Newhouse admitted to growing marijuana plants on his property. RP 7, 36. Detective Adkisson and Officer Holum testified substantially similarly. RP 15, 19.

Rita Roberts, Mr. Newhouse's next door neighbor, testified that she had driven by his gate a few moments before police arrived, and the gate was closed. RP 22. According to Ms. Roberts, Mr. Newhouse is a very private person who has the gate and signs because he does not want people to come up his driveway. RP 23.

Additionally, Ms. Roberts told the court that Mr. Newhouse's residence cannot be seen from the street, from her property, from any other neighbor's property, or from any public property. RP 25. "It's pretty closed up in there. There's a lot of trees around it." Id. See

² Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 94 (1966).

that he was going to get a search warrant, at which time Mr. Newhouse admitted to having 20-40 marijuana plants on his property. RP 35-36.

After Mr. Newhouse's neighbors were raided by the police for marijuana a few years ago, Mr. Newhouse put up the two "No Trespassing" signs at either side of the entrance of his driveway. RP 39, 40. See Exhibit 6. These signs, Mr. Newhouse told the court, were intended to keep people from coming up the driveway and to keep people from hunting on his property. RP 39, 41. According to Mr. Newhouse, the signs worked as intended until Detective Engelbertson arrived. RP 39. No one ever came up the driveway uninvited. Id. Even the utilities people stop at the foot of the driveway. Id.

Finally, Mr. Newhouse told the court that when he first moved into the area, Ms. Roberts' father, who had been a pioneer in the area, told him, "it's good old country folk, but don't get on their bad side. Don't be walking past signs or don't just walk up and knock on their door. They are pretty well averse to that." To which Mr. Newhouse responded, "well, that sounds just like my kind of neighborhood." RP 44-5.

2. The Parties' Arguments. The state argued that the gate was open, and that so long as Detective Engelbertson had not wandered off the driveway, he was permitted to use the driveway to approach the residence to conduct legitimate police business. RP 50. The legitimate police

business was “just gathering information which ultimately led to his [sic] warrant.” Id. According to the prosecutor, Detective Engelbertson initially went onto the property alone “so that he wouldn’t have to, you know, threaten the defendant at all . . .” Id. The prosecutor summed up the state’s position as follows: “Our constitution allows for a person not to be disturbed in his private affairs – that’s one thing – but it does not allow a person to not have his criminal conduct invaded which in this particular case Mr. Newhouse was growing marijuana and the officer was just simply there to investigate it, so any intrusion at all was extremely minimal.” RP 50.

The defense argued that whether or not the gate was open, the key facts are that there were clear “No Trespassing” signs posted on either side of the gate, the driveway was long, winding, and heavily wooded, and the Newhouse residence was not visible from anywhere else. RP 52. Given these facts, under the Johnson³ case, the police intrusion violated Washington Constitution article 1 § 7. RP 53-4. Access to the home was private, and the police lacked any lawful authority to intrude on that privacy. RP 52, 54.

³ 75 Wn.App. 692, 702, 703, 879 P.2d 984 (1994).

3. The Trial Court's Findings and Conclusions. The trial court found that the gate was open, that the driveway was over 450 feet long and winding and set in a rural area; the residence is not visible from any public or neighboring property, the "No Trespassing" signs were posted on either side of the driveway, and that there is a gate. RP 56; Findings of Fact and Conclusions of Law 1.4 (attached as Appendix A). Given these facts, the court decided that going up to the Newhouse residence amounted to an intrusion into private affairs or a private area, according to Johnson, Ridgeway, and Littlefair. RP 56. The trial court further found that the desire to talk to Mr. Newhouse does not provide lawful authority to intrude into a private area. RP 57; Appendix A, Conclusion 3.4. The trial court specifically rejected the prosecutor's argument that because Detective Engelbertson was on "legitimate police business," such business inherently provided lawful authority. To agree with that proposition would, the court said, "get the Fourth Amendment swallowed by the claim of legitimate police business." RP 57.

E. ARGUMENT

THE TRIAL COURT PROPERLY FOUND THAT POLICE
INTRUDED ON MR. NEWHOUSE'S PRIVATE AFFAIRS
WITHOUT LAWFUL AUTHORITY, NECESSITATING
SUPPRESSION

A trial court's decision on a suppression motion is reviewed for an abuse of discretion. See State v. Wittenbarger, 124 Wn.2d 467, 490, 880 P.2d 517 (1994) (holding trial court abused its discretion in suppressing evidence). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003) (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). Otherwise stated, a trial court abuses its discretion if it can be said no reasonable person would have adopted the trial court's decision. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). If the trial court enters findings of fact and conclusions of law in accordance with CrR 3.6(b), the appellate court considers whether substantial evidence supports any challenged findings of fact and whether the findings support the trial court's conclusions of law. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). The underlying questions of law is reviewed de novo. Id. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade

a fair-minded, rational person of the truth of the finding. State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

1. Washington Constitution, Article 1 § 7 provides greater privacy protection than does the Fourth Amendment of the United States Constitution. Washington article 1 § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that article 1 § 7 "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Accordingly, while article 1 § 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Mendez, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); State v. Johnson, 128 Wn.2d 431, 446, 909 P.2d 293 (1996); State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

It is by now axiomatic that article 1 § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); State v. Hendrickson, 129 Wn.2d 61, 69, n.1, 917 P.2d 563 (1996).

When assessing police intrusions into individuals' privacy, courts engage in a delicate balancing of interests, weighing safety and evidentiary concerns against the basic notion that the people of this state enjoy a measure of privacy that is, and will forever be, unassailable. See State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (Washington Constitution protects those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass and does not depend on subjective expectations of privacy).

2. The police entry onto the Newhouse property violated Article 1 § 7 of the Washington Constitution.

[T]he presence of the long history of territorial and state laws prohibiting trespass indicates that Washington places important emphasis on a person's right to exclude others from his or her private property, regardless of the size or developed state of that property

State v. Johnson, 75 Wn.App. 692, 702, 703, 879 P.2d 984 (1994).

Where police trespass onto private property, the state bears a “heavy” burden to show that the entry falls within one of the narrowly drawn exceptions to the requirement that all searches be preceded by judicial authorization. Because Mr. Newhouse’s long, winding, heavily wooded driveway was not impliedly open, the police entry onto the Mr. Newhouse’s private property was unconstitutional.

a. Lacking a warrant or probable cause, the police can only rely upon the “impliedly open” doctrine. The state does not claim that when Detective Engelbertson moved past the “No Trespassing” signs, he possessed a valid warrant or probable cause to search or arrest. Accordingly, the state’s appeal rests solely upon the “impliedly open” doctrine. According to this doctrine, a person does not have a legitimate expectation of privacy in impliedly open access way to a residence. Johnson, 75 Wn. App. at 704.

b. Whether an access way onto private property is “impliedly open” depends on many factors. Whether a particular access way is “impliedly open” is considered on a case-by-case basis. Id. at 706-07; State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). No published case limits the factors that can be considered. A review of the following cases reveals the type of factors generally considered relevant in an “impliedly open” analysis.

In Johnson, the Court of Appeals determined that the Johnson driveway was not impliedly open because there were signs reading “Private Property” and “No Trespassing” by the driveway, and a closed gate and a fence marking the property boundary. Id. at 696. Additionally, the house itself was not visible without entering the Johnson’s private

property, and the property was in an isolated area accessible only by a dirt road. Id.

As in Johnson, Mr. Newhouse placed two No Trespassing-type signs by his driveway. His house, like the Johnsons', was not visible without entering his private property, and it is in an isolated area. The only difference between his situation and that of the defendants in Johnson is the trial court's finding here that the gate was open.

The Court of Appeals distinguished its decision in Johnson from that of State v. Hornback. 73 Wn. App. 738, 871 P.2d 1075 (1994). In Hornback, the Court of Appeals decided that different circumstances warranted a different outcome. There, the house was visible from the street, the owner had erected no fence or gate, and the property was located in a residential area in which homes were clearly visible from other homes. Id. at 743-44. Further, Mr. Hornback admitted that he had removed his "No Trespassing" sign from the foot of his driveway for a period of several months before the incident. Id. at 744. A photo taken a few days after the police entry showed no "No Trespassing" sign. Id. Accordingly, the court was unable to determine with certainty whether Mr. Hornback had replaced the sign before the officers entered his property. Id. at 744. For all these reasons, the Court of Appeals held that the driveway was impliedly open and the officers' entry did not violate the

Fourth Amendment. Notably, the Court did not address whether it would have reached the same outcome had it been asked to analyze the case under the more stringent privacy protections of Article 1, § 7.

Hornback is completely unlike Mr. Newhouse's situation. Mr. Newhouse lives in isolated seclusion; Hornback lived in a residential area in which homes were clearly visible from one another. In Hornback it is unclear whether there was even a "No Trespassing" sign posted at the time, where in contrast the officers here admit that there were "No Trespassing" signs. The Hornback driveway was not barred by a gate; in this case, while officers claim that the gate was open, in reality Mr. Newhouse kept his gate closed and independent eyewitnesses will testify that they personally observed that the gate was closed on the day that the officers entered the driveway.

State v. Gave is even less similar to Mr. Newhouse's case. 77 Wn. App. 333, 890 P.2d 1088 (1995). In Gave, the homeowner did not erect the "No Trespassing" signs nor had he adopted them as his own. Id. at 335, 338. The five signs were situated along a road owned by the City of Olympia, positioned at various points both before, near, and after passing the Gave property. Id. at 335. Two of the signs specifically referenced the City of Olympia, and at the end of the road there was a City watershed. Id. The police had received permission from the City of Olympia before

they entered the road, and the police believed based on the location and wording of the signs that all the signs referred to the City watershed and thus did not apply to them. Id. Gave's house was visible from the City road and there was no gate or fence. Id. at 336. The police drove up the driveway, knocked on the front door, and conducted a polite conversation regarding a fictitious person they claimed to be seeking. Id. Smelling the odor of marijuana while speaking with Gave, they left the property. Id.

Relying solely upon the City's "No Trespassing" signs, Gave unsuccessfully argued that the police entry violated Article 1, § 7. Id. at 336-37. Rejecting this argument, the Court of Appeals held that reliance upon No Trespassing signs erected by another, not adopted as one's own, and not clearly pertaining to the defendant's property will not defeat the impliedly open nature of a property access way. Id. at 338.

Gave is almost the exact inverse of Mr. Newhouse's situation. Mr. Gave's property was visible from the road and he did absolutely nothing to express his desire for privacy. He did not even put up a sign. On the other hand, Mr. Newhouse chose isolated property specifically because of its privacy, and put up two signs and a gate to insure that solitude. Gave bears no resemblance to Mr. Newhouse's circumstances.

On the other hand, even the absence of a "No Trespassing" sign does not necessarily render an access way impliedly open. State v.

Ridgway, 57 Wn. App. 915, 790 P.2d 1263 (1990). In Ridgway, the Court of Appeals found that placement of a closed gate at the foot of a 200 yard long curving driveway combined with barking guard dogs at the house created an expectation of privacy such that the driveway was not impliedly open. Id. at 917-18.

The state relies upon State v. Ague-Masters, 138 Wn. App. 86, 97-8, 156 P.3d 265 (2007) to support its claim that the Newhouse driveway was open to the police. Ague-Masters presents a different situation, however, since in Ague-Masters it is unclear whether there was a No Trespassing sign and the police were on the property to locate an individual with an arrest warrant whom they believed to be on the property at that moment. 138 Wn. App. at 98-99. The state does correctly recite the applicable standard that “police with legitimate business may enter areas of the cartilage which are impliedly open such as access routes to the house, so long as they do so as would a reasonably respectful citizen.” Id. at 97-8. Indeed the state repeatedly pounds home its point that police on “legitimate police business” may enter an impliedly open area.

This argument has two flaws. First, our Supreme Court has explicitly stated that “legitimate police business” specifically excludes investigation on private property to develop information to support a search warrant. State v. Ross, 141 Wn.2d 304, 313-14, 4 P.3d 130

(2000)(“contrary to the dissent's view that the officers were on legitimate police business investigating criminal activity, the officers' purpose was not to investigate criminal activity but to obtain information to prepare the affidavit in order to obtain a search warrant.”); See also State v. Littlefair, 129 Wn. App. 330, 334, 119 P.3d 359 (2005).

Second, whether police may enter an impliedly open area is not in dispute here. What is in dispute is whether the Newhouse driveway and residence were an impliedly open area, one that a reasonably respectful citizen would believe he or she was welcome to enter.

The state suggests that this court should not view the Newhouse property as private because Mr. Newhouse did not erect “high fences, closed gates, or security devices” at his property. BOR at 11, 12. These measures are not necessary, nor should the court limit its consideration to those few factors. Whether a particular access way is “impliedly open” is considered on a case-by-case basis and there is no case that limits the factors that may be considered in the analysis. 75 Wn. App. at 704; 95 Wn.2d at 902.

c. According to all the factors that may be considered, the Newhouse property is not “impliedly open.” The factors present in this case – which all are supported by substantial evidence – establish that the Newhouse driveway and residence are not impliedly open to the public:

- **the property is in an isolated rural area**
(FOF 1.1; Exhibits 5, 6, 7)
- **the property is heavily wooded**
(Exhibits 5, 6, 7)
- **the winding driveway is over 450 feet long**
(FOF 1.5)
- **two “No Trespassing” signs are prominently posted on either side of the driveway entrance**
(FOF 1.4; Exhibit 6)
- **a gate is at the foot of the winding driveway**
(FOF 1.6; (Exhibit 6)
- **the residence is set back, not visible from the Road or from any public area**
(FOF 1.2; (Exhibits 5, 7)
- **the residence is not visible from neighboring property**
(FOF 1.3)
- **utility workers do not go up the driveway without authorization from Mr. Newhouse**
(RP 39)
- **until Detective Engelbertson, no one had entered Mr. Newhouse’s property uninvited**
(RP 39)

Since these factors establish that the Newhouse property is not impliedly open to the public, this court should decline to overturn the trial court’s decision.

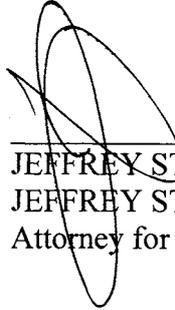
F. CONCLUSION

The facts upon which the trial court relied are all supported by substantial evidence, the driveway was not impliedly open to the public, and the collection of evidence to support a search warrant is not “legitimate police business” providing authority of law to intrude on a

citizen's private property. Accordingly, the trial court's decision should be upheld.

DATED this ___th day of May, 2008.

Respectfully submitted:



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Plaintiff,

v.

TIMOTHY NEWHOUSE,
Defendant.

No. 36768-8-II

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Brief of Respondent, Motion to Dismiss Cross Appeal and this Certificate of Service were served on June 2, 2008, via first class U.S. mail, postage prepaid, upon the parties required to be served in this action:

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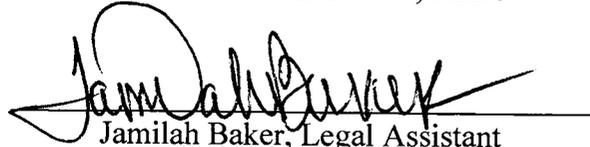
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DATED this 2nd day of June, 2008.

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