

No. 36928-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Patricia Schultz,**

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Clallam County Superior Court

Cause No. 05-1-00114-2

The Honorable Judge Kenneth D. Williams

**Appellant's Reply Brief**

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## ARGUMENT

**I. THERE IS NO “DOMESTIC VIOLENCE” EXCEPTION TO WASH. CONST. ARTICLE I, SECTION 7, AND THE EMERGENCY EXCEPTION DOES NOT APPLY TO THIS CASE.**

Our Supreme Court has said that “[i]n no area is a citizen more entitled to [her] privacy than in [her] her home. For this reason, the closer officers come to intrusion into a dwelling, the greater the constitutional protection.” *State v. Young*, 123 Wn.2d 173 at 185, 867 P.2d 593 (1994), *internal citations omitted*.

An overheard argument does not—in the absence of any indication of violence—justify warrantless entry into a home, even if one resident claims no one else is present. Wash. Const. Article I, Section 7; *State v. Leffler*, 142 Wn. App. 175, 173 P.3d 293 (2007). Respondent’s statements about an exception to the warrant requirement “when dealing with what is perceived to be a domestic violence situation” are overbroad. Brief of Respondent, p. 5.

In fact, the emergency exception to the warrant requirement—one of only a few narrow and jealously guarded exceptions—permits warrantless entry only when (1) the officer subjectively believes entry is necessary to protect the health and safety of a specific person, (2) a

reasonable person<sup>1</sup> would have the same belief, and (3) “there is an imminent threat of substantial injury...” *Leffler*, at 181-182, 184.

When the officers entered Ms. Schultz’s apartment, there was no indication of domestic violence. The anonymous report of yelling, the sound of raised voices, the demand for “more space” by the male voice, and even Ms. Schultz’s obvious lie when the officers were at the door do not suggest that a warrantless entry was necessary to protect anyone’s health or safety. If the officers were suspicious as a result of her lie, they could have asked Ms. Schultz to step out of the apartment and posed additional questions, but they were not permitted to cross the threshold absent some indication of violence. In the words of William Pitt,<sup>2</sup> delivered to Parliament in 1763:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement!  
*State v. Ferrier*, 136 Wn.2d 103 at 112 n. 6, 960 P.2d 927 (1998),  
*citations omitted*.

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<sup>1</sup> The correct standard is a “reasonable person” standard; Respondent erroneously attempts to apply a “reasonable police officer” standard. Brief of Respondent p. 6. If there is a difference, it is that officers are expected to maintain a degree of suspicion when dealing with situations that involve the potential for criminality.

<sup>2</sup> Britain’s Earl of Chatham, and Prime Minister from 1766–1768.

Ms. Schultz's dishonesty did not suggest the need for a warrantless entry into her home, even when combined with reports of yelling and raised voices. Respondent asks "If all was well, why did the appellant deliberately attempt to conceal Mr. Robertson's presence?" Brief of Respondent, p. 6. Apparently Respondent suffers from a failure of imagination. A homeowner may seek to conceal the presence and identity of a guest because he is having an affair and doesn't want the neighbors to know, because she is meeting with a political rival and doesn't want the press to know, because he is prostituting herself and doesn't want anyone to know, or for dozens of other reasons.

In the absence of a true emergency, the police may not enter a residence simply because the homeowner does not physically bar entry. Respondent's reliance on a pre-*Gunwall* case is misplaced. Brief of Respondent, p. 7, citing *State v. Sabbot*, 16 Wn.App. 929, 561 P.2d 212 (1977). In the post-*Ferrier* world, officers conducting a "knock and talk" investigation are required to warn homeowners of their right to refuse entry. Other entries based on alleged consent (and conducted for reasons that fall short of a true emergency) are evaluated under a totality-of-the-circumstances test. Under that test, the state has the burden of demonstrating the voluntariness of the consent; this is a question of fact requiring examination of whether *Miranda* warnings were given, the

degree of education and intelligence of the consenting person, and whether the consenting person was advised of her or his right to refuse consent. *State v. Reichenbach*, 153 Wn.2d 126 at 132, 101 P.3d 80 (2004). The trial court did not find that Ms. Schultz had voluntarily consented to entry, and nothing in the record suggests that she did.

Finally, Respondent makes no attempt to address Officer Hill's entry, which occurred after the question of domestic violence had been completely resolved. Even if the initial entry had been justified, Officer Hill's decision to cross the threshold violated Ms. Schultz's right not to have her home invaded without authority of law. Wash. Const. Article I, Section 7.

Because the warrantless entry was not justified by the emergency exception, the subsequent warrant was invalid, and the items seized from Ms. Schultz's apartment must be suppressed. *Leffler, supra*. Her conviction must be reversed and the case dismissed.

## **II. AFTER ILLEGALLY ENTERING, THE OFFICERS ARRESTED PATRICIA SCHULTZ WITHOUT PROBABLE CAUSE.**

The officers were not permitted to arrest Ms. Schultz for a crime "involving the use or possession of cannabis" under RCW 10.31.100 because they did not identify residue in the pipe on the table as cannabis residue until after the arrest. RP (8/5/07) 20, 34, 68. Respondent's

reliance on RCW 10.31.100 to justify the warrantless arrest is therefore misplaced. *State v. O'Neil*, 104 Wn.App. 850, 17 P.3d 682 (2001).

Accordingly, this Court must suppress the evidence, reverse her convictions, and dismiss the case.

**III. IN ADDITION TO BEING TAINTED BY THE WARRANTLESS ENTRY AND THE UNLAWFUL ARREST, THE WARRANT WAS OVERBROAD, AND CANNOT BE SAVED BY THE DOCTRINE OF SEVERABILITY.**

Plastic baggies and a tin obviously used to ingest drugs do not create probable cause to believe that someone is engaged in drug sales. Contrary to Respondent's suggestion, nothing in the telephonic search warrant affidavit linked these items to drug sales. Brief of Respondent, p. 11-13. *See* Affidavit, CP 41.

Furthermore, application of the doctrine of severability in this case "would render meaningless the standards of particularity which ensure the avoidance of general searches and the controlled exercise of discretion by the executing officer." *State v. Perrone*, 119 Wn.2d 538 at 558, 834 P.2d 611 (1992). An overbroad warrant cannot be saved by the severability doctrine unless there is "a meaningful separation to be made of the language in the warrant." *State v. Perrone*, at 560. Here there is no such meaningful separation: the warrant applied to evidence of drug dealing, for which there was no probable cause. The language of the warrant did not distinguish between items to be seized that might establish possession,

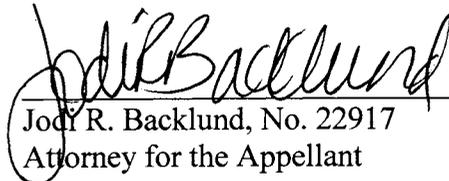
as opposed to items that related only to drug sales. Accordingly, the doctrine of severability cannot save this warrant. *Perrone, supra*.

**CONCLUSION**

The police violated Ms. Schultz's constitutional right not to have her home invaded without authority of law. The search warrant, tainted by the officers' earlier warrantless entries, was unconstitutionally overbroad. The evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice.

Respectfully submitted on April 9, 2008.

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CERTIFICATE OF MAILING

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

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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 April 9, 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 April 9, 2008.

  
~~Marek R. Mistry, No. 22922~~  
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