

original

NO. 36945-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK CONDON,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 FEB 22 PM 12:50
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Theodore Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant's motion to suppress evidence seized from his home.

2. The trial court erred by failing to enter Findings of Facts and Conclusions of Law on the "Stipulated Facts Trial" CP 15.

3. The Superior Court erred by entering the Felony Judgment and Sentence.

Issues Pertaining to Assignments of Error

1. Whether the failure of police to provide Ferrier warnings upon gaining entry into a person's home vitiates consent

2. Whether failure to enter written findings of fact and conclusions of law prejudiced appellant. .

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 20, 2007, the Kitsap County Prosecutor charged Patrick Condon with unlawful possession of a firearm in the second degree. CP 1-6. Following a 3.6 hearing in which the judge admitted the seized evidence, Mr. Condon waived his right to a jury trial and entered into a stipulated facts trial. CP 15-16. The trial court did not enter written findings of fact and conclusions of law.

The unlawful possession of a firearm charge arose from the seizure of a rifle after the police made a warrantless search of Condon's home. Before trial, Condon moved to suppress the

physical evidence seized from his home, arguing his consent to police to search his home was invalid. CP 7-14.

An evidentiary hearing on the defense motions was held the day of the stipulated trial on 10-17-07. CP 15. At the conclusion of the hearing the court denied the defense motions to suppress. RP 41. In relevant part the trial court orally ruled as follows.

With regard to the fundamental questions here in this case, as consent is an exception, the State must prove by clear, cogent and convincing evidence that the consent was voluntarily given by someone with authority. . . . I find under the facts of this case that there was a legitimate exception by consent.

RP 41.

Based on a stipulated trial, the court found Condon guilty as charged. CP 17-26.

This appeal timely follows. CP 28.

2. Facts Relevant to Appeal

Bremerton Police Officer Kelly Meade was on duty August 18, 2007 when he decided to follow up on an August 17, 2007 theft of service from a Chinese Take-Out Restaurant. RP 7-8. Mead went to Condon's home and knocked on the door and asked for Condon. A man named James Nell (or Nall) answered the door and pointed out

Condon to Meade. RP 8-9. Meade asked Nell to step aside so that Meade could talk to Condon. RP 9. Condon was cooperative and answered Meade's questions.

Meade asked Condon where he was at the time of the theft of services and confirmed that the telephone call for Chinese food was made from Condon's telephone. RP 20. Condon stated that he did not know who ordered food from his home and that he was at Illahee State Park from 1600 on August 17, 2007 until 1600 on August 18th after which he was at a bar called the Winterlands with a woman. RP 10.

According to Meade, after this conversation, Condon allowed Meade to come in and look for the Chinese food in the kitchen and living area. Meade did not see any Chinese food and left the house. RP 11. After Meade left and walked to the sidewalk, Mr. Nall told Meade that he thought that he had heard a woman screaming from the back of the house when he arrived earlier. RP 11. Meade did not ask Nell any questions about the person he thought he heard. RP 23-24. With this new information, Meade returned to Condon's house and approached the front door. From the front door, Condon responded to Meade's questions about a woman in the back room. RP 11-12. Condon said that there was no woman in the back room, but allowed Meade to go in and search.

Prior to obtaining the verbal consent to search in the first instance, the police never informed Condon of the Ferrier warnings, i.e., he had the right to refuse a search of his house, he could revoke consent at any time, or he could deny the police entry in the first place.¹ RP 9-11. In addition, Condon was never advised of his Miranda² rights. RP 9-11. Meade testified that he had probable cause to arrest Condon before going to his house based on the information relating to the theft of services. When Meade arrived at Condon's house he performed a "Knock-and talk" and simply started asking Condon questions about the theft of services. The purpose of the knock and talk was to discover evidence of the theft of services in the house. After Meade questioned Condon, Condon permitted Meade to look in the kitchen and living area for evidence of the Chinese food. Meade did not inform Condon that he did not have to allow Meade to enter his home. RP 9-11, 17, 22. After looking in the kitchen and living area and not finding any Chinese food, Meade left the house.

Condon was intoxicated at the time of the interaction with the police. RP 19-20.

¹ These warnings are referenced as "Ferrier" warnings in light of the requirements of State v. Ferrier, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998). Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

C. ARGUMENT

1. THE PHYSICAL EVIDENCE SHOULD
BE SUPPRESSED BECAUSE
CONDON'S CONSENT TO SEARCH
WAS INVALID.

Under article I, § 7 of the Washington Constitution, warrantless searches are per se unreasonable. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). Article I, § 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under this provision, the warrant requirement is especially important as it is the warrant which provides the requisite "authority of law." Morse, 156 Wn.2d at 7 (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). Exceptions to the warrant requirement are to be "jealously and carefully drawn." Morse, at 7. The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. Id.

The home receives heightened constitutional protection. State v. Kull, 155 Wn.2d 80, 84, 118 P.3d 307 (2005). Thus, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." Kull, 155 Wn.2d at 85 (citing State v.

Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984) (Chrisman II)).

Intrusion into private dwellings "places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement". Kull, 155 Wn.2d at 85.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Ladson, 138 Wn.2d at 359. Under article I, § 7, suppression is constitutionally required. Id.

a. Condon's Consent Was Not Voluntary, Knowing and Intelligent.

Consent to a search is one exception to the warrant requirement. State v. Holmes, 108 Wn. App. 511, 516, 31 P.3d 716 (2001). The State must however prove that the consent was given freely and voluntarily. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances, including (1) whether Miranda warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent. O'Neill, at 588. "In examining all the surrounding circum-

stances to determine if the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 2049, 36 L. Ed. 2d 854 (1973). The appellate court conducts an independent examination of the record in reviewing the trial court's finding of voluntariness. State v. Thorkelson, 25 Wn. App. 615, 617, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980).

b. The Police Violated The Rule Established In State v. Ferrier Requiring Warnings To Be Given Prior To Warrantless Home Searches.

Article 1 § 7 of the Washington Constitution requires police seeking consent to search a person's home under a "knock and talk" scenario to provide warnings that a person may refuse consent, revoke consent, or limit the scope of consent. State v. Ferrier, 136 Wn.2d at 118-119. Failure to provide these warnings prior to entering the home vitiates any consent given thereafter. 136 Wn.2d at 119.

Our Courts have agreed that the "knock and talk" is an inherently coercive procedure; that most home dwellers are not aware of their right to refuse to allow the police to search their

homes; and that most will allow such a search if not fore warned of their right to refuse such a request. Ferrier, 136 Wn.2d at 115; Holmes, 108 Wn. App. at 516; The warnings mandated by Ferrier are thus intended to preserve the voluntariness of consent.

Article I, section 7 of our state's constitution provides greater protection against home invasion than does the Fourth Amendment to the United States Constitution. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). *Article I, section 7* provides privacy protections against home intrusion "with no express limitations." State v. Young, 123 Wn.2d at 180 (quoting State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

When analyzing whether *article I, section 7* provides greater protection for privacy interests, the Court must apply the six nonexclusive criteria that were first identified in State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808, 76 A.L.R.4th 517 (1986). When examining a constitutional provision that has previously been analyzed under Gunwall, this Court may adopt the prior Court's analysis. In Gunwall, the Supreme Court analyzed Article 1 §7 and determined that factors one, two, three, and five³ provide for

³ 5 Those factors are: (1) the state constitution's textual language; (2) significant textual differences between parallel state and federal

independent review under our state constitution. Similarly in Ferrier, in the Supreme Court applied Gunwall factors four and six to determine that the knock and talk procedure required an independent review under Article 1 § 7. Ferrier, 136 Wn.2d at 112. This Court may adopt the prior Court's determination that independent review under Article 1 § 7 is required. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

In State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) the Court's "analysis of *art. I, § 7 of the Washington Constitution* begins with the proposition that warrantless searches are unreasonable per se." Hendrickson, 129 Wn.2d at 70.

In Ferrier the Court relying on Young recognized that "in examining our state constitution's explicit protection of the *home*, the fact the search occurs at a home is central to the analysis." Ferrier, 136 Wn.2d at 113, quoting, Young, 123 Wn.2d at 185 n.2. In Ferrier, the Court held that the police violated her expectation of privacy in her home because they conducted a knock and talk in order to search her home without a warrant. The police admitted

constitutional provisions; (3) state constitutional and common law history; and (5) structural differences between the state and federal constitutions. Gunwall, 106 Wn.2d at 61-62.

that they did not advise her of her right to refuse to consent to the search. This procedure was aimed at avoiding the general requirement that a search warrant be obtained and “flies in the face of our previous admonition that ‘[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.’” Ferrier, 136 Wn.2d at 115, quoting, State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989) (quoting approvingly from United States v. Impink, 728 F.2d 1228, 1231 (9th Cir. 1984)).

The facts of Ferrier are quite similar to Condon’s case. In Ferrier, the police went to Ferrier’s home on a tip that she had a marijuana grow operation in the house. The police did a knock and talk to gain entry into the home and informed her that they knew she had a grow operation and wanted to search the house. The police did not advise her of her right to refuse to consent to the search and thus the consent given was held to be invalid. Ferrier, 136 Wn.2d at 107-108, 119.

This case is governed by Ferrier because Meade, like the police in Ferrier, performed a knock and talk to gain entry into Condon’s house for the purpose of looking for "contraband or

evidence". E.g., State v. Holmes . The police did not enter the house to interview someone, to arrest someone, or to check on someone's health or welfare: Meade initially went to Condon's home to search for evidence of contraband related to the theft of services. RP 16-17. Meade's return to the house was to search for evidence of the crime of unlawful imprisonment and also to continue to search for evidence of the theft of services. RP 26. Meade's sole purpose in going to Condon's home was to investigate the home for evidence of the two crimes.

Under Ferrier, warnings were required before entering Condon's home. The outright failure to give Ferrier warnings completely vitiating any consent because without the warning the consent could not be knowing, voluntary and intelligent. Condon's consent to search was invalid because it was obtained in violation of Ferrier. Without valid consent, the warrantless search of the house was unconstitutional. The evidence seized from the home should be suppressed. Ladson, 138 Wn.2d at 359.

2. FAILURE TO FILE WRITTEN
FINDINGS PREJUDICED
APPELLANT

The court denied the defense motion to suppress the

physical evidence seized in the search of Condon's house. RP 41; CP 15 (Appendix A). The court did not enter written findings and conclusions following the 3.6 hearing or following the stipulated facts trial as required under CrR 6.1(d). Id.

The trial court's failure to enter findings and conclusions after the stipulated trial may require reversal if the defendant is prejudiced. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), review denied, 130 Wn.2d 1027, 930 P.2d 1229 (1997)⁴. A defendant is prejudiced by a failure to enter written findings when the record is insufficient to permit appellate review and where the state tailors the findings following appellant's opening brief. Head, 136 Wn.2d at 622-25; State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (dismissal required by failure to enter written findings); State v. Smith, 76 Wn. App. 9, 16-17, 882 P.2d 190 (1994), review denied, 126 Wn.2d 1003 (1995); State v. Smith, 68 Wn. App. 201, 209-11, 842 P.2d 494 (1992). Prejudice is determined on a case-by-case basis. Cruz, 88 Wn. App. at 909. Prejudice can also arise from late entered filings that have been

⁴ Because Byrd did not appeal denial of his suppression motion, the court could not find prejudice.

"tailored" to meet issues raised on appeal. Head, 136 Wn.2d at 625.

Failure to file written findings is only "harmless error if the court's oral opinion and the record of the hearing are 'so clear and comprehensive that written findings would be a mere formality.'" Smith, 76 Wn. App. at 13, (citations omitted).

A trial court's oral opinion is never as clear and comprehensive as written findings; it is "no more than oral expressions of the court's informal opinion at the time rendered. . . [it] . . . has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. State v. Head, 136 Wn.2d at 622, quoting, State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966) accord State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980). The Court in Head held that "[a]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 623-25. In the absence of a showing of prejudice, remand for entry of written findings and conclusions is generally the solution for failure to enter written findings. State v. Head, 136 Wn.2d at 623-25.

In Smith, 68 Wn. App. at 209-211, a juvenile case, the Appellate Court determined that Smith was prejudiced by the trial court's opinion following a bench trial because it was not clear enough to permit review. Smith, 68 Wn. App. at 608.

In Cruz, the Appellate Court reversed after determining that the trial court's memorandum was not clear enough to permit review. In the instant case, the trial court failed to render a comprehensive oral decision sufficient to permit appellate review of the issues raised. The record of the court's decision is vague and unclear. Prejudice exists in the instant case because the record is insufficient to permit appellate review.

Furthermore, the state is now in a position to "tailor" its findings to meet the issues raised in appellant's opening brief. There is no excuse for the trial court's failure to enter written findings and both Divisions One and Two of the Court of Appeals have held in both adult and juvenile settings that neither Court would condone the failure to file written findings. Cruz, 88 Wn. App. at 211; Smith, 68 Wn. App. at 211. The Supreme Court in Head also requires reversal where prejudice is established.

In Condon's case, after considering that Condon was intoxicated and that Miranda warnings were not given, the trial

court orally stated that:

With regard to the fundamental questions here in this case, as consent is an exception, the State must prove by clear. Cogent and convincing evidence that the consent was voluntarily given by someone with authority. . . . I find under the facts of this case that there was a legitimate exception by consent.

RP 41. In accord with Head, Cruz, and Smith, 68 Wn. App. at 909, reversal is required because the trial court's oral ruling is insufficient to permit meaningful appellate review and the state is now in a position to tailor its findings. In the alternative and at a minimum, a remand is necessary. Head, supra.

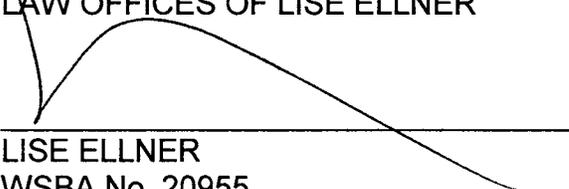
D. CONCLUSION

For the reasons stated above, Condon's conviction should be reversed and the evidence suppressed.

DATED this 21st day of February 2008.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office, Appeals Dept. 614 Division Street, MS-35 Port Orchard, WA 98366-4692 and Patrick Condon Patrick Robert Condon 1584 Spruce St. #J4 Bremerton, WA 98310 a true copy of the document to which this certificate is affixed, on February 21, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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