FILED
COURT OF APPEALS
DIVISION II

08 NOV 14 PM 12: 13

STATE OF WASHINGTON
BY DEPUTY

No. 37646-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RYAN WAYNE ALLEN

Appellant.

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

The Honorable Richard Strophy and Christine A. Pomeroy, Judges
Cause No. 07-1-02163-2

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. The evidence of the second assault rifle, forming the basis for Count II, was lawfully obtained and the trial court was correct to deny the defendant's motion to suppress 1

2. The bail jumping statute is not ambiguous; it does require a defendant to appear before the court at any time the court orders and of which he has notice. 9

3. The State presented sufficient evidence to support a conviction for bail jumping 11

D. CONCLUSION 14

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Nix v. Williams,
467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 377 (1984)..... 5

Washington Supreme Court Decisions

State v. Cardenas,
146 Wn.2d 400, 47 P.3d 127 (2002)..... 2, 9

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980)..... 12

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980)..... 12

State v. Patterson,
83 Wn.2d 49, 515 P.2d 496 (1973)..... 5

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992)..... 12

State v. Warner,
125 Wn.2d 876, 889 P.2d 479 (1995)..... 6

Decisions Of The Court Of Appeals

State v. Ball,
97 Wn. App. 534, 987 P.2d 632 (1999)..... 10, 11

State v. Bryant,
89 Wn. App. 857, 950 P.2d 1004 (1998)..... 13

State v. Carver,
122 Wn. App. 300, 93 P.3d 947 (2004)..... 11, 13

State v. Fredrick,
123 Wn. App. 347, 97 P.3d 47 (2004)..... 13

State v. Hall,
53 Wn. App. 296, 766 P.2d 512 (1989) 3

State v. Kitchen,
75 Wn. App. 295, 877 P.2d 730 (1994) 13, 14

State v. Reyes,
98 Wn. App. 923, 993 P.2d 921 (2000) 6

State v. Richman,
85 Wn. App. 568, 933 P.2d 1088 (1997) 6

State v. Smith,
137 Wn. App. 262, 153 P.3d 199 (2007) 2, 3

Statutes and Rules

RCW 9A.76.170 9

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence pertaining to the second rifle, which formed the basis of Count II, should have been suppressed as unconstitutionally obtained.

2. Whether failure to appear at a hearing on the State's motion to revoke conditions of release can form the basis for a conviction for bail jumping.

3. Whether sufficient evidence was presented at trial to support Allen's conviction for bail jumping.

B. STATEMENT OF THE CASE.

The State accepts Allen's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The evidence of the second assault rifle, forming the basis for Count II, was lawfully obtained and the trial court was correct to deny the defendant's motion to suppress.

Allen argues that the exigent circumstances exception to the warrant requirement does not apply to Deputy Simper's actions in entering the residence and securing the second assault weapon. The State maintains that it does.

Warrantless entries are presumed to be unreasonable, both under the Fourth and Fourteenth Amendments to the United States Constitution, as well as under article I, section 7, of the Washington Constitution. However, "warrant requirements must yield when

exigent circumstances demand that police act immediately." State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). Exigent circumstances include threats to officer safety. State v. Smith, 137 Wn. App. 262, 268, 153 P.3d 199 (2007). Washington courts look to a list of six factors to determine if exigent circumstances justify a warrantless entry and search. It is not necessary that each factor be present in a given case, but the State must prove, in light of those factors, that the officer(s) needed to act quickly in the situation. Id., at 268-69. Those factors are:

> (1) the seriousness or violence of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information that the suspect is guilty, (4) whether there is strong reason to believe that the suspect is on the premises, (5) the likelihood that the suspect will escape if not swiftly apprehended, and (6) whether the entry was made peaceably.

Id.

These factors were obviously developed for entirely different situations than that present in this case. However, the State amply proved that the deputy needed to act quickly, and, as far as the facts of this case can be fit into the six factors, the deputy's actions were reasonable. "In order to find that exigent circumstances exist, this court must also be satisfied that the asserted emergency was

not merely a pretext for the search . . . This inquiry involves a determination of both the subjective and objective reasonableness of the belief that an emergency existed." Id., at 269 (cite omitted). The totality of the circumstances is to be considered when scrutinizing a warrantless entry or search. State v. Hall, 53 Wn. App. 296, 301, 766 P.2d 512 (1989).

Deputy Simper testified, at both the suppression hearing and the trial, that when he arrived at the defendant's residence the music was so loud that the windows of the mobile home were rattling and he could not hear his police radio, even though it was turned up to top volume. There were two vehicles at the residence. There was a sign in the window threatening to shoot trespassers and prosecute survivors. On his second knock, the door was jerked open in an aggressive manner and the deputy was faced with the defendant holding a loaded assault rifle. The deputy ordered him to put the weapon down, which he did, and then handcuffed him outside. Allen argues that at this point the concerns for officer safety ended.

They did not. Because there was more than one vehicle and the music was very loud, the deputy had reason to be concerned that other people were present, even though Allen denied it. If there

were others in the residence, weapons were available, and the sign in the window was more than a joke, the deputy was an easy target. Assault rifles would seem to indicate the possibility of greater violence than, for example, hunting rifles or even handguns. An officer should not be required to bet his life on the defendant being truthful.

When the deputy entered the residence, he did no more than was necessary to locate the second weapon, unload it, and place it with the first rifle inside the home. At that time he did not know Allen was not permitted to possess firearms, had no reason to think in terms of what crimes he may have committed, and thus was not conducting a criminal investigation. His concern was solely for his own safety. He was working alone, in a rural area, with his nearest backup a minimum of ten minutes away, a backup he called for as soon as he told Allen to put the gun down. He asked Allen to lead him to the second rifle, which Allen did without objection. He did not know that no other persons were present until he had walked through the home and secured the second rifle.

In determining whether there are sufficient facts to demonstrate a threat to officer safety, the standard is based on the reasonable police officer. The focus is on whether a reasonably

cautious police officer, under the circumstances, would be justified in believing that his safety was in danger. State v. Patterson, 83 Wn.2d 49, 57, 515 P.2d 496 (1973). Deputy Simper's actions could not have been any more objectively reasonable. He did what he had to do, and only what he had to do, to ensure his own safety, and he did it immediately. He did not search for evidence, he did not arrest Allen until later, he did not remove the weapons from the residence. His actions were a textbook example of what a police officer should do under these circumstances. The trial court did not err in refusing to suppress the evidence of the second weapon.

Allen challenges the findings of fact and conclusions of law that support the admissibility of the evidence, even if there had been error, under the inevitable discovery doctrine. Allen maintains that this doctrine has never been countenanced by the Washington Supreme Court. In fact, it has.

The United States Supreme Court adopted the inevitable discovery rule in Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The rule was applied when the "prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." Id. The Washington Supreme Court adopted the

same rule in State v. Warner, 125 Wn.2d 876, 889, 889 P.2d 479 (1995), adding, "Absolute inevitability of discovery is not required but simply a reasonable probability that evidence in question would have been discovered other than from the tainted source." Id. Warner was decided on the basis of federal law, but Division One of this court, in State v. Richman, 85 Wn. App. 568, 933 P.2d 1088 (1997), found that the Supreme Court implied that the rule did not offend article I, section 7, and "we doubt the Warner court would have so sanctioned the rule if it perceived state constitutional defects." Richman, *supra*, at 574 n. 4.

> [T]he Richman court held that the inevitable discovery rule as set forth by the federal courts, Justice Dolliver's dissent in [State v. Broadnax, 98 Wn. 2d 289, 309, 654 P.2d 96 (1982)] and Division One in [State v. White, 76 Wn. App. 801, 809, 888 P.2d 169 (1995)], "contains adequate safeguards to ensure that police misconduct does not erode the privacy protections provided by article 1, section 7." 85 Wn. App. at 577. The Richman court further held that under the inevitable discovery doctrine, illegally obtained evidence is admissible "only when the State can prove that the evidence would have been inevitably discovered under proper and predictable investigatory procedures. 85 Wn. App. at 577 (citing White 76 Wn. App. at 809. "The State must prove this inevitability by a preponderance of the evidence." (Cites omitted.)

State v. Reyes, 98 Wn. App. 923, 928-29, 993 P.2d 921 (2000).

Here, even assuming that the deputy acted unreasonably, the second gun would have been discovered in the normal course of "proper and predictable police procedures." Simper would have certainly checked the warrant status of the defendant, leading to his arrest on the outstanding warrant, and a routine criminal history check would have revealed, as it did, the felony conviction on Allen's record. Simper did not seek a warrant until he had probable cause to believe that Allen was not permitted to possess firearms. The officer did nothing intrusive that was not directly related to ensuring his own safety.

Allen argues that the State did not properly argue inevitable discovery by way of an article 1, section 7 analysis, nor concede that the deputy's actions were illegal. It is not clear why that matters. In any event, the State did cite to both the federal and state constitutions for authority to support the inevitable discovery doctrine [CP 20], and argued that even if Simper's actions were not authorized by law, the evidence would be admissible under inevitable discovery. [03/24/08 RP 26-27] The findings of fact were based on the testimony of the deputy and the reasonable inferences to be drawn from it.

Allen further complains that the trial court's findings of fact and conclusions of law go beyond the arguments the State offered, in that the court found that the deputy's observations were "lawful open view observations." [CP 32] He does not explain how that is improper or detracts from the findings and conclusions based solely on State arguments. The State did not argue plain view; it wasn't necessary.

Allen argues that the Findings of Fact are not supported by the record, specifically Finding of Fact No. 5 [CP 30], that someone aggressively rushed towards the door. That does not seem sufficiently different from "the door was jerked open and in a very aggressive manner," [03/24/08 RP 7] to make a difference in the legal conclusions of the court. Similarly, while the deputy testified that Allen held the firearm at a 45-degree angle, pointed toward the ground [03/24/08 RP 7], the terminology of the trial court that it was held at "the low ready position" does not seem contradictory. Allen further objects to Findings of Fact 8 through 10 [CP 31] in that there was no testimony that there were 30 rounds in the banana clip of the first weapon seized. Allen is not contesting the seizure of that weapon, so again it is unclear why this is an objectionable misstatement by the trial court. The deputy did testify that there was

a banana clip in the weapon and one round was in the chamber. [03/24/08 RP 7, 10] The second weapon also had a round in the chamber. [03/14/08 RP 11] The findings of which Allen complains are so minor, and so tangential to the legal conclusions reached, that they cannot be said to be error.

Allen further objects to Findings of Fact 11 though 15 [CP 31] as irrelevant because they deal with facts following the search and seizure. On the contrary, the actions of the deputy following the seizure of the second weapon bear directly on the reasonableness of his actions, specifically that they occurred after, and not before or during, the entry into the residence.

The trial court's findings of fact are supported by the evidence. This court reviews conclusions of law de novo, Cardenas, *supra*, at 407. Those conclusions properly follow from the findings of fact.

2. The bail jumping statute is not ambiguous; it does require a defendant to appear before the court at any time the court orders and of which he has notice.

Allen was convicted of bail jumping under RCW 9A.76.170, which reads:

> Bail jumping. (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance

> before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Allen argues that he can only be held responsible for appearing before the court on dates that were set at the time he was released by the court, *i.e.,* December 21, 2007. That is not the case. The State need only prove that the defendant knew prior to the hearing of his required presence at the hearing for which he failed to appear. State v. Ball, 97 Wn. App. 534, 536-37, 987 P.2d 632 (1999). In Allen's case, the order on conditions of release which was in place at the time he failed to appear was issued on December 21, 2007, before he had even been charged. [Exhibit 7] No further dates were set, or could have been set, at that time, and it is not reasonable to limit a defendant's liability for failure to appear only to court dates set at that hearing. Given the frequency with which schedules change and hearings are continued, the statute would be essentially meaningless if it were interpreted as Allen urges. In any event, the order here did require that he appear in court on three days notice, and he signed the order, acknowledging receipt of a copy.

Allen appears to argue that he cannot be convicted of bail jumping if he did not contemporaneously promise to appear at future hearings. [Brief of Appellant, pg. 20] The statute does not require that he promise to appear, only that he have notice of the hearing. He also argues that the statute is ambiguous because it can be read to mean he could be found guilty of bail jumping for failure to appear at unanticipated future hearings. That is what the statute does say, but it is not ambiguous because his first interpretation is not supported by the plain reading of the statute or State v. Ball, *supra*.

3. The State presented sufficient evidence to support a conviction for bail jumping.

Allen argues that there was insufficient evidence that he knowingly failed to appear, in that he may not have received the notice in a timely manner. The State's burden is to prove that he had knowledge of the date and did not appear, not that he knowingly failed to appear. State v. Carver, 122 Wn. App. 300, 303, 93 P.3d 947 (2004).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.* (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here the testimony and exhibits established that a notice was mailed to Allen, requiring him to appear at a hearing on the State's motion to revoke his release [Exhibits 8 and 9]. The notice

was mailed on February 11, 2008, and the hearing was scheduled three days later, February 14. The notice was mailed to the address he had given the court. [04/02/08 RP 40] He failed to appear on February 14. [04/02/08 RP 45, Exhibit 10].

The State is required only to prove that the defendant was given notice of his court date. Carver, *supra*, at 306; State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). Specific intent may be inferred from circumstantial evidence. State v. Bryant, 89 Wn. App. 857, 870-71, 950 P.2d 1004 (1998) If a reasonable person would have known of the hearing, the evidence is sufficient for the jury to conclude that the defendant knew. Id., at 871.

Here the notice was mailed to Allen. In State v. Kitchen, 75 Wn. App. 295, 877 P.2d 730 (1994), a case involving a speedy trial issue based on whether Kitchen received his summons, the court said this:

> The State may assume, and the trial courts should presume, that a letter sent by regular first-class mail to the defendant's correct address and not returned to the sender was delivered, and that the defendant was given notice of the charge filed against him. . . . A nonappearance at the scheduled arraignment will then normally implicate fault on the part of the defendant.

Id., at 298 (internal cite omitted).

The presumption, however, is rebuttable, and if the defendant can show that he had not received notice, or not received it on time, he would not be liable.

> It is the defendant's burden to overcome the presumption of adequate notice. In this regard, the courts should be slow to accept a simple denial by a defendant that the notice was received as sufficient to overcome the presumption that such notice was received when properly mailed.

Id.

Allen did not offer any excuse for not appearing. Since he did not carry his burden, it is not for this court to speculate on whether or not he received notice, but to presume that he did. A reasonable trier of fact could have found from the evidence presented that Allen received the notice of the hearing, and thus his failure to appear constituted bail jumping.

D. CONCLUSION.

The evidence presented at the suppression hearing supported the Findings of Fact entered by the trial court, which, in turn, support the Conclusions of Law. The exigent circumstance exception to the warrant requirement justifies the limited warrantless intrusion into the defendant's residence, and even if it did not, the inevitable discovery doctrine would apply. The bail jumping statute is not ambiguous and the evidence presented at

trial supports Allen's conviction for bail jumping. The State respectfully asks this court to affirm all of his convictions.

Respectfully submitted this 13th day of November, 2008.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 37646-6-II, on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid

☐ ABC/Legal Messenger

☐ Hand delivered by

_____

FILED
COURT OF APPEALS
DIVISION II
08 NOV 14 PM 12: 13
STATE OF WASHINGTON
BY_____
DEPUTY

TO:

PATRICIA ANNE PETHICK
ATTORNEY AT LAW
PO BOX 7269
TACOMA WA 98417

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of November, 2008, at Olympia, Washington.

_____
TONYA MAIAVA