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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 37860-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Rhonda Hos,**

Appellant.

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Jefferson County Superior Court

Cause No. 07-1-00168-4

The Hon. Judge Craddock Verser and Commissioner James Bendell

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The admission of evidence seized without a warrant violated Ms. Hos's constitutional right to privacy under Wash. Const. Article I, Section 7.
2. The trial court erred by admitting evidence seized following a warrantless intrusion into Ms. Hos's residence.
3. The trial court erred by concluding that Deputy Post's warrantless entry into Ms. Hos's residence was justified under the "community caretaking" exception to the warrant requirement.
4. The trial court erred by convicting Ms. Hos following a bench trial, in the absence of a jury waiver.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Article I, Section 7 requires exclusion of evidence seized following a warrantless search unless the state meets its heavy burden of showing that the search falls within an exception to the warrant requirement. The prosecution failed to show that Deputy Post's warrantless intrusion into Ms. Hos's residence fell within an exception to the warrant requirement. Should the trial judge have suppressed the evidence seized by Deputy Post after his warrantless entry into her home?
2. Washington's "community caretaking" exception is narrower than its federal counterpart, requiring law enforcement officers to use the least intrusive means available to achieve their "community caretaking" purpose. Deputy Post did not use the least intrusive means available to check on Ms. Hos's health and safety. Must the evidence seized following Deputy Post's warrantless entry into Ms. Hos's home be suppressed?
3. An accused person's waiver of the constitutional right to a jury trial must be done in writing or orally on the record. Neither Ms. Hos nor her attorney waived her right to a jury trial. Must her conviction, entered following a stipulated bench trial, be reversed?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Rhonda Hos was asleep on her living room couch when a Sheriff's Deputy opened the door to her house and came inside without a warrant. The deputy, Brian Post, was accompanying a CPS social worker who had come to investigate a referral for child neglect. RP (2/1/08) 35-37. Rhonda's daughter, the subject of the referral, was at school. RP (2/1/08) 42, 63.

Deputy Post and the social worker approached the house, which had a broken window. RP (2/1/08) 37. Deputy Post knocked on the solid wood door "pretty loudly," with no response. RP (2/1/08) 37, 54. He then looked through a big window by the door, and saw Ms. Hos wearing a jacket with large pockets; she was "slouched over on the couch" with her chin on her chest. RP (2/1/08) 37-38, 54-55. Deputy Post "could not tell if she was breathing or not," and told the social worker "it appears she's either unconscious or dead." RP (2/1/08) 37-38, 54. The social worker looked through the window: "I could see the front of her and she was sitting on the couch slouched over and it wasn't clear whether she was breathing at that point." RP (2/1/08) 38.

Deputy Post pounded on the door and then looked through the window, and didn't see Ms. Hos respond. RP (2/1/08) 54. He then

opened the door and yelled "Rhonda?" RP (2/1/08) 54. He walked into the house and yelled "Sheriff's office," approaching to within four or five feet of her.<sup>1</sup> RP (2/1/08) 54-55.

Ms. Hos raised her head. RP (2/1/08) 55. Deputy Post described her as bleary eyed, red eyed, and lacking coordination. RP (2/1/08) 55. She had a butane crème brulee torch near her leg, and numerous items in her pockets. RP (2/1/08) 51, 55, 57. After the social worker received permission to look through the house, the deputy asked Ms. Hos if she had any weapons in her pockets. RP (2/1/08) 48, 57. She said she did not, and he asked if she would be willing to empty her pockets. RP (2/1/08) 57. She stood and patted her pockets, and Deputy Post saw a used methamphetamine pipe in one open pocket. RP (2/1/08) 57. He arrested her, searched her, and found methamphetamine in a purse in one of her pockets. RP (2/1/08) 57-59.

Ms. Hos was charged with Possession of Methamphetamine.<sup>2</sup> CP

1. Her motion to suppress the evidence was denied after a hearing.<sup>3</sup> RP

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<sup>1</sup> The social worker testified that Ms. Hos awoke before the officer went inside, and that Deputy Post asked permission to come in. RP (2/1/08) 39. The court resolved this discrepancy in favor of Deputy Post's testimony that he walked in without permission. RP (2/1/08) 74-75.

<sup>2</sup> A second charge of Criminal Misdemeanor in the Third Degree was dismissed without trial. CP 2; RP (6/20/08) 103.

(2/1/08) 73-78. Through her attorney, she stipulated to the police reports, and was convicted following a bench trial. RP (6/20/08) 99-103. Neither she nor her attorney explicitly waived her right to a jury trial, either orally on the record, or in writing. *See*, RP (6/20/08), *generally*.

Ms. Hos appealed, and her sentence was stayed pending the appeal. CP 12; RP (6/20/08) 107.

### ARGUMENT

**I. THE ADMISSION OF EVIDENCE OBTAINED THROUGH A WARRANTLESS ENTRY INTO MS. HOS'S RESIDENCE VIOLATED HER CONSTITUTIONAL RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7.**

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. It is "axiomatic" that Article I, Section 7 provides stronger protection to an individual's right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>4</sup> *State v. Parker*, 139 Wn.2d 486,

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<sup>3</sup> The court made oral findings, but did not enter written findings. RP (2/1/08) 73-78.

<sup>4</sup> The Fourth Amendment provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states

493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under Article I, Section 7, the prohibition against warrantless searches is subject to a few well-guarded exceptions; absent an exception, warrantless searches are impermissible. *State v. Eisfeldt*, 163 Wn.2d 628, \_\_\_, 185 P.3d 580 (2008). Exceptions to the warrant requirement are narrowly drawn, and the state bears a heavy burden in showing that a search falls within an exception. *Eisfeldt*, at \_\_\_. Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *State v. Kypreos*, 110 Wn.App. 612, 616, 39 P.3d 371 (2002).

Furthermore, “[t]his constitutional protection [against warrantless searches] is at its apex ‘where invasion of a person’s home is involved.’” *Eisfeldt*, at \_\_\_, (quoting *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), *cert. denied*, 128 S. Ct. 1651 (2008)). A person’s home

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through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

receives heightened constitutional protection because “a person’s home is a highly private place.” *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994).

Here, the state relied on several bases for the entry and search: the “community care-taking” exception to justify the initial warrantless entry into the home, on the “consent” exception to justify further intrusion and the officer’s continued presence in the residence, on the “consent” and “plain view” exceptions to justify the officer’s observation of a glass pipe in Ms. Hos’ pocket, and on the “search incident to arrest” exception for the officer’s subsequent search and seizure of the methamphetamine from her pocket.

Only the initial intrusion into the home is challenged here.

- A. The “community caretaking” exception to the warrant requirement is narrower under Article I, Section 7 than it is under the Fourth Amendment.

Under the Fourth Amendment, a “community caretaking” exception to the warrant requirement “allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety.” *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228

(2004).<sup>5</sup> Permissible searches conducted under this exception include, for example, a warrantless search of a vehicle impounded after a traffic accident (*Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)); a warrantless entry to assist with a medical emergency (*State v. Angelos*, 86 Wn. App. 253, 936 P.2d 52 (1997)), and temporary detention and welfare checks on young children (but not older children) (compare *State v. Acrey*, 148 Wn.2d 738, 753, 64 P.3d 594 (2003) with *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000) ). The Washington Supreme Court has yet to explicitly approve “community caretaking” as an exception to the protections afforded by Article I, Section 7. *Kinzy*, at 387 n. 38; *State v. Moore*, 129 Wn. App. 870, 880, 120 P.3d 635 (2005).

However, the Court has implicitly held that any “community caretaking” exception to Article I, Section 7 is narrower than its federal counterpart. *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). In *Houser*, the Court rejected the impoundment and inventory search of a car under a “community caretaking” theory, first, because the officers’ assertion of “community caretaking” in that case was clearly a pretext,

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<sup>5</sup> Under the Fourth Amendment, the exception does not apply unless (1) the officers subjectively believe that someone likely needs assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there is a reasonable basis to associate the need for assistance with the place being searched. *Thompson*, at 802.

second, because the officers had reasonable alternatives to impoundment, and third, because the officers' search of a locked trunk exceeded the scope of a permissible inventory search.<sup>6</sup> *Houser*, at 152-160.

Although *Houser* did not reference Article I, Section 7, Washington courts have since affirmed that *Houser* rested on state constitutional grounds. First, the Supreme Court held that the *Houser* rule against pretexts was based on Article I, Section 7. See *State v. Ladson*, 138 Wn.2d 343, 350, 353, 356, 979 P.2d 833 (1999).<sup>7</sup> Second, in *White, supra*, the Supreme Court applied Article I, Section 7 to reaffirm *Houser's* rule prohibiting inventory searches of locked trunks. See *White, supra*, at 766 ("*Houser* is grounded in article I, section 7 of the Washington State Constitution.") Third, the Court of Appeals relied on Article I, Section 7 to reaffirm *Houser's* requirement that officers consider available alternatives before proceeding with an impound. *State v. Hill*, 68 Wn. App. 300, 305-307, 842 P.2d 996 (1993) (distinguishing the U.S. Supreme

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<sup>6</sup> The Court also found that the police lacked probable cause to believe the car was stolen, and thus could not search on that basis. *Houser*, at 149-150.

<sup>7</sup> *But see Kinzy, supra*, at 387 n. 38: "In *Ladson*, this Court correctly explained the holding of *State v. Houser*, but somewhat mischaracterized it as 'an article I, section 7, case.'"

Court's contrary Fourth Amendment holding in *Colorado v. Bertine*, 479 U.S. 367, 93 L. Ed. 2d 739, 107 S. Ct. 738 (1987)).<sup>8</sup>

*Houser* and these subsequent cases establish that the “community caretaking” exception to the warrant requirement—if it exists under our state constitution’s right to privacy—is narrower under Article I, Section 7 than it is under the Fourth Amendment. In this case, Deputy Post’s actions fell outside the legitimate bounds of “community caretaking” because he failed to pursue the least intrusive means available to check on Ms. Hos’s health and safety.

- B. Article I, Section 7 requires exclusion of evidence seized after a warrantless entry into the accused person’s home unless the officers use the least intrusive means of achieving their purpose under the “community caretaking” exception.

Under federal law, a warrantless search or seizure performed for “community caretaking” purposes need not be limited to the least intrusive means. *See, e.g., United States v. Johnson*, 410 F.3d 137, 146 (4th Cir. 2005). Our state constitution, however, requires exclusion of evidence

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<sup>8</sup> Other cases have also recognized that *Houser* was grounded in an independent application of Article I, Section 7. *See, e.g., York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 323, 178 P.3d 995 (2008) (citing *Houser* as an example of a decision finding greater protection for citizens under Article I, Section 7); *State v. Boland*, 115 Wn.2d 571, 577-578, 800 P.2d 1112 (1990) (same).

seized following a warrantless intrusion into a person's home, unless discovered through the least intrusive means of achieving the "community caretaking" purpose.

First, "[i]n contrast to the Fourth Amendment, article I, section 7 protects privacy interests without express limitation and exceptions to the warrant requirement must be narrowly applied." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 323, 178 P.3d 995 (2008). This suggests that intrusions under the "community caretaking" exception are justified only when achieved by the least intrusive means possible; any expansion beyond the least intrusive means would violate those protected privacy interests and would result in an exception that is not "narrowly applied."

Second, unlike the Fourth Amendment (which protects only against unreasonable searches), Article I, Section 7 is unconcerned with the reasonableness of a search. *Eisfeldt, supra*, at \_\_\_\_\_. Instead, "[o]ur constitution protects legitimate expectations of privacy, '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. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007), (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). Once again, this suggests that the evidence must be excluded under the "community caretaking" exception unless discovered through the least intrusive means of achieving the

exception's purpose; otherwise, the privacy interests of Washington citizens would be subject to invasion upon a showing of mere reasonableness.

Third, Washington's exclusionary rule "has a long history, independent from that of the federal rule... When an individual's right to privacy is violated, article I, section 7 requires the application of the exclusionary rule." *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997). Three primary objectives underlie Washington's exclusionary rule: "[F]irst, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means." *Boland, supra*, at 581 (quoting *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983)).<sup>9</sup>

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<sup>9</sup> By contrast, the Fourth Amendment exclusionary rule is subject to exceptions, which are justified when the rule would "not result in appreciable deterrence" of police misconduct. *United States v. Janis*, 428 U.S. 433, 454, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). See also e.g., *United States v. Leon*, 468 U.S. 897, 919-920, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (exception where searching officer executes defective search warrant in "good faith"); *Arizona v. Evans*, 514 U.S. 1, 14, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (exception for clerical errors by court employees); *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) (exception for impeachment purposes).

In this case, the officer and social worker should have attempted less intrusive means of contacting Ms. Hos prior to opening the door to her residence. Assuming the truth of their observations (that they knocked on the door without response, that they saw Ms. Hos “slouched” on the couch, and that they couldn’t tell whether or not she was breathing), there were alternatives available besides opening the door. The record does not establish that either of them considered shouting through the broken window at the front of the house, shouting or making large motions at the window near the door, tapping on the window near the door, telephoning into the house, or taking any other actions to get her attention.

Under these circumstances, the warrantless entry into the home was not the least intrusive means of checking on Ms. Hos’s welfare. Accordingly, evidence derived from the intrusion should have been excluded under Article I, Section 7. The conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Houser, supra; White, supra.*

**II. MS. HOS WAS DENIED HER CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE SHE DID NOT PERSONALLY APPROVE HER ATTORNEY’S IMPLIED WAIVER.**

The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal

defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. VI, U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois*, 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L. Ed. 2d 798 (1988).

Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; furthermore, the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419, 427-428, 35 P.3d 1192 (2001). In the absence of a valid waiver of the federal right, a criminal defendant’s conviction following a bench trial must be reversed. *Treat, supra*.

In this case, Ms. Hos did not waive her constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the U.S. Constitution. The record does not contain a written waiver signed by Ms. Hos; nor did Ms. Hos ratify her attorney’s purported waiver on the record.

Accordingly, her conviction must be reversed and the case remanded to the superior court for a new trial. *Treat, supra; Taylor, supra.*

**CONCLUSION**

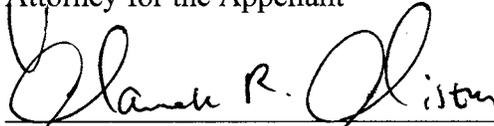
For the foregoing reasons, Ms. Hos's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on November 20, 2008.

**BACKLUND AND MISTRY**



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COURT OF APPEALS  
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CERTIFICATE OF MAILING

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

Rhonda Hos  
255 S. Maple St.  
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and to:

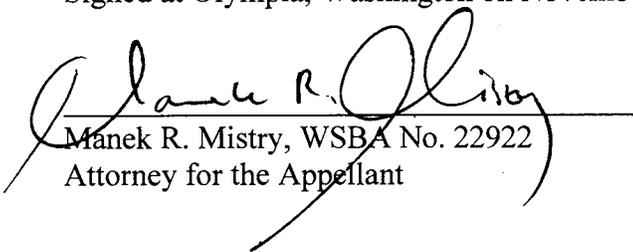
Jefferson County Prosecuting Attorney  
P.O. Box 1220  
Port Townsend, WA 98368

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 20, 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 November 20, 2008.

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
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