FILED
COURT OF APPEALS
DIVISION II

09 JUN 26 AM 11:27

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 38650-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEIF ECKLUND,

Appellant.

AMENDED BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

ORIGINAL

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iii

B. ASSIGNMENT OF ERROR

1. Assignment of Error 1

2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE 3

D. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE POLICE VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN THEY MADE A WARRANTLESS ENTRY INTO THE TRAVEL TRAILER IN WHICH THE DEFENDANT WAS LIVING 7

***1. Deputy Grasseth's Failure to Give Ed Ecklund Ferrier Warnings Vitiates Any Consent Ed Ecklund Gave* 8**

***2. Deputy Grasseth Coerced Consent to Search from Ed Ecklund* 13**

***3. Deputy Grasseth's Failure to Get the Defendant's Consent Invalidates the Search* 18**

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT SENTENCED HIM FOR AN OFFENSE WITHOUT A FINDING OF GUILT BY THE TRIER OF FACT 24

E. CONCLUSION 27

F. APPENDIX

1. Washington Constitution, Article 1, § 3 28

2. Washington Constitution, Article 1, § 7 28

3. United States Constitution, Fourth Amendment 28

4. United States Constitution, Fourteenth Amendment 28

TABLE OF AUTHORITIES

Page

Federal Cases

Arizona v. Washington,
434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 25

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 24

Schneckloth v. Bustamonte,
412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) 14

United States v. Homburg,
546 F.2d 1350 (9th Cir. 1976) 14

Washington v. Chrisman,
455 U.S. 1, 70 L.Ed.2d 778, 102 S.Ct. 812 (1982) 13

State Cases

State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999) 12

State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994) 7

State v. Castillo, 144 Wn.App. 584, 183 P.3d 355 (2008) 25

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998) 8-13

State v. Matlock, 27 Wn.App. 152, 616 P.2d 648 (1980). 11

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005) 19, 22-24

State v. Murray, 84 Wn.2d 527, 527 P.2d 1303 (1974) 14

State v. Nedergard, 51 Wn.App. 304,
753 P.2d 526, *review denied*, 111 Wn.2d 1007 (1988) 19

State v. Rodriguez, 20 Wn.App. 876, 582 P.2d 904 (1978) 14

State v. Shoemaker, 85 Wn.2d 207, 533 P.2d 123 (1975) 14-16

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 7

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 24

State v. Tagas, 121 Wn.App. 872, 90 P.3d 1088 (2004) 12

State v. Werth, 18 Wn.App. 530, 571 P.2d 941 (1977) 14, 16, 17

State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000) 12, 13

Constitutional Provisions

Washington Constitution, Article 1, § 3 24

Washington Constitution, Article 1, § 7 ..... 7, 9, 19-21, 23

United States Constitution, Fourth Amendment 7

United States Constitution, Fourteenth Amendment 24

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 7, 15, 19

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence because the police violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment when they made a warrantless entry into the travel trailer in which the defendant was living because (1) Deputy Grasseth's failure to give Ed Ecklund *Ferrier* warnings vitiated any consent Ed Ecklund gave, (2) Deputy Grasseth coerced consent to search from Ed Ecklund, and (3) Deputy Grasseth failed to get the defendant's consent to search. RP 1-32, CP 32-34.

2. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it sentenced him for an offense without a finding of guilt by the trier of fact.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a motion to suppress evidence the police find when they search a home without a warrant in an attempt to find drugs when (1) they fail to give the homeowner *Ferrier* warnings, (2) they coerce consent, and (3) when they fail to get all of the tenants consent?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment if it sentences him for an offense without a finding of guilt by the trier of fact? CP 35-37.

STATEMENT OF THE CASE

Ed Ecklund and his wife Sheba Ecklund live at 232 N. Welcome Slough Road in Wahkiakum County. RP 24-27. On January 3, 2008, they got into a domestic dispute, which resulted in Ed calling the sheriff's office and asking for assistance. *Id.* Although Ed did not know it, Sheba later called the Sheriff's office and told them that her adult step-son Leif had a marijuana grow in her husband's travel trailer on the property. RP 3-5. Although she claimed she had seen it, she did not say when and she did not claim any expertise in identifying growing marijuana. RP 13-14.

The travel trailer in which Sheba Ecklund claimed Leif had the marijuana grow is about 23 feet long, and sits at the end of the driveway about 50 feet from the house. RP 24-27. Ed has allowed his son Leif to live in it for about five years. *Id.* Based upon Sheba Ecklund's claims over the telephone, Deputy Josh Grasseth went to 232 N. Welcome Slough Road in order to see if he could get consent to search for the alleged marijuana grow. RP 18-19. Once at the home, he spoke with Ed and Sheba out by the trailer. RP 5-8. Ed told him that he owned the trailer and had allowed his son to live in it for the past five years. *Id.* During this conversation, the defendant called his father. RP 29. Deputy Grasseth was standing next to Ed during this telephone call, and asked Ed to tell his son to come home. *Id.* Ed did so.

After the telephone conversation, Deputy Grasseth told Ed that one

of three things was going to happen: (1) he was going to give the Deputy consent to search the trailer for a marijuana grow, (2) the Deputy was going to have his drug dog circle the trailer and the Deputy was then going to search the trailer without consent, or (3) the Deputy was going to go get a warrant and search the trailer. RP 7-8, 12-18, 28. Deputy Grasseth did not give Mr. Ecklund the warnings required under *State v. Ferrier. Id.* Ed Ecklund responded to the deputy's statement by giving his consent for the Deputy to search for the marijuana grow. *Id.* Deputy Grasseth then entered the trailer and found a marijuana grow. RP 8-9. During or right after this search, the defendant arrived home and the deputy arrested him. RP 10-11.

The Wahkiakum County Prosecutor later charged the defendant Leif Ecklund with one count of manufacture of marijuana and use of drug paraphrenalia. CP 1-2. The defendant then brought a motion to suppress all of the evidence seized during the search. CP 10-14. At a later hearing, the state called Deputy Grasseth as a witness, and the defense called Ed Ecklund. RP 3, 24. They testified to the preceding facts. RP 1-33. Following argument, the court denied the motion, and eventually entered the following findings of fact and conclusions of law on the issue. CP 32-34.

FINDINGS OF FACT

1.1 On January 3, 2008, Wahkiakum dispatch gave Deputy Josh Grasseth a complaint regarding a marijuana grow located at 232 N. Welcome Slough Road on Puget Island. The female caller,

identified as Sheba Ecklund, told Deputy Grasseth that her step-son, Leif Ecklund, had a marijuana grow in a travel trailer which belonged to her husband, Ed Ecklund. Mrs. Ecklund said she had seen the grow. Deputy Grasseth told her he would be right over. Deputy Grasseth arrived within seven minutes.

1.2 At the residence, Deputy Grasseth spoke with both Mr. and Mrs. Ecklund. Deputy Grasseth was told the marijuana grow was inside the travel trailer in which Mr. Ecklund had allowed his son to live. Mr. Ecklund said he was the only one with a key to the trailer and had access whenever he wanted. Deputy Grasseth asked Mr. Ecklund if he would allow him to see the marijuana grow. Deputy Grasseth told Mr. Ecklund he had two options: (1) consent to the search, or (2) the Deputy would get a warrant. Mr. Ecklund said, "yes" (to the search) and opened the door.

1.3 Mr. Ecklund and Deputy Grasseth went inside the trailer and Deputy Grasseth observed a small marijuana grow inside the bathroom (two plants with a halogen light in the bathtub). Deputy Grasseth observed a timer which had two cords running from it, one to the bathtub and one to a small closet beside the toilet. Inside the closet were seven more marijuana plants with a halogen light.

1.4 Deputy Grasseth asked Mr. Ecklund if he could look around the trailer. Mr. Ecklund said "yes." Deputy Grasseth located a plastic box with marijuana seeds and marijuana leaf residue, a black digital scale and a marijuana seeds and marijuana leaf residue, a black digital scale and a marijuana grinder.

CONCLUSIONS OF LAW

2.1 The "knock and talk" procedure under Ferrier does not apply when police officers are invited into their homes for investigative purposes. State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000), State v. Tagas, 121 Wn.APp. 872, 90 P.3d 1088 (2004).

2.2 A "totality of circumstances" test is used to determine whether consent to search is valid. State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999).

2.3 Because the consent was voluntary and Mr. Ecklund had

> authority to consent and the search did not exceed the scope of consent, the consent to search the trailer was valid. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975).

CP 32-34.

Following denial of the motion to suppress, the defendant submitted to a bench trial on stipulated facts. CP 35-37. The court rendered its verdict in writing, which stated as follows:

IV. VERDICT

> 4.1 The Defendant, Leif W. Ecklund, is guilty of possession with intent to manufacture or deliver a controlled substance, to-wit: marijuana.

CP 37.

The court later sentenced the defendant within the standard range on this offense. RP 38-47. In spite of the fact that the court did not render a verdict on the paraphernalia charge, the court also sentenced the defendant for this offense. *Id.* The defendant thereafter filed timely notice of appeal. CP 50.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE POLICE VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN THEY MADE A WARRANTLESS ENTRY INTO THE TRAVEL TRAILER IN WHICH THE DEFENDANT WAS LIVING.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). One of these exceptions holds that a warrantless search is constitutional when preceded by valid consent. *State v. Cantrell*, 124 Wn.2d 183, 875 P.2d 1208 (1994).

In the case at bar, the trial court found that the state had proved the consent exception to the warrant requirement. As the following explains, the trial court erred because (1) Deputy Grasseth failed to give Ed Ecklund *Ferrier* warnings when required, (2) Deputy Grasseth coerced Ed Ecklund

into giving consent, and (3) Deputy Grasseth's failure to get the defendant's consent vitiates the search.

1. Deputy Grasseth's Failure to Give Ed Ecklund Ferrier Warnings Vitiates Any Consent Ed Ecklund Gave.

In *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), the police received information that there was a marijuana grow at the defendant's house. Not having sufficient evidence to obtain a search warrant, the police decided to go to the defendant's house to see if she would consent to a search. Upon arriving at the house, two officers went to the front door and two went to the back. The officers at the front then knocked and identified themselves when the defendant came to the door. At that point, the defendant invited the officers into the house. Once in the house, the two officers at the back door also entered. The officers then explained that they had information about a marijuana grow in the house, and they asked for permission to search. They did not inform her that she did not have to consent to their entry into her home, or that she did not have to consent to the search of her home, and they did not inform her of her *Miranda* rights. They did, however, have her sign a written consent to search. After the defendant signed the consent to search, the officers went upstairs and found the suspected marijuana grow.

Following her arrest, the defendant moved to suppress, arguing that her consent was coerced. The trial court denied the motion, and the

defendant later submitted to conviction on stipulated facts. The defendant then appealed, arguing that the procedure used by the police, called a "knock and talk," was per se a violation of Washington Constitution, Article 1, § 7. A "knock and talk" is a procedure in which the police attempt to get consent to make a warrantless search of a person's home. Following argument, the Court of Appeals affirmed, and the defendant obtained review before this court.

In its decision, this court first noted that (1) the procedure used by the police met the constitutional requirements of the Fourth Amendment, and (2) that the failure to inform of the right to refuse entry and the failure to inform of a person's *Miranda* rights were just two of many facts to be considered in determining whether the consent given was knowing and voluntary under the Fourth Amendment. The court then began an analysis under the enhanced privacy protections available under Washington Constitution, Article 1, § 7. In this analysis, the court did recognize the inherently coercive nature of a situation in which the police go to a person's home and attempt to get a consent to enter and search. However, the court still declined to find the "walk and talk" procedure a per se violation of our state constitution. On this point, the court noted: "We wish to emphasize that we are not entirely disapproving of the knock and talk procedure, and we understand that its coercive effects are not altogether avoidable." Id.

However, in recognition of the enhanced expectation of privacy that our state constitution and law create in a person's home, this court held that before the police may make a warrantless entry into a person's home based upon consent, they must first explicitly inform the defendant of his or her right to refuse entry. This court stated:

> While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. ***The failure to provide these warnings, prior to entering the home***, vitiates any consent given thereafter.

State v. Ferrier, 136 Wn.2d 1118-119 (emphasis added).

The underlying principle in this decision is that under the heightened privacy protections our state constitution affords to a person's home, officers of the state may not circumvent the warrant requirement and obtain a waiver of those enhanced privacy rights without first informing the occupants of the home that they have the right to deny the police request. Thus, in *Ferrier,* this court invalidated the search because the police did not inform the defendant of her right to exclude them from her home before they (1) obtained consent for a warrantless entry, and (2) before they obtained consent

for a warrantless search.

The case at bar is similar to that in *Ferrier*. In the case at bar, Deputy Grasseth received a call form Sheba Ecklund claiming that the defendant, her step-son, had a marijuana grow in the travel trailer that the defendant's father owned and in which the defendant's father had allowed him to live for many years. However, Sheba Ecklund did not claim to have any possessory interest in the travel trailer and did not claim that she had the authority to consent to a search of the travel trailer. Thus, Deputy Grasseth decided to go to the location of the travel trailer in order to seek consent from a person who did have authority to consent to the search.

In addition, as in *Ferrier*, Deputy Grasseth did not have a search warrant. Indeed, he did not have probable cause with which to get a search warrant in spite of what he later said to Mr. Ecklund because he lacked two essential facts from Sheba Ecklund with which to get the warrant: (1) the time frame in which she claimed she saw the marijuana grow, and (2) a claim as to how she had the expertise necessary to identify a marijuana grow. *See State v. Matlock*, 27 Wn.App. 152, 616 P.2d 648 (1980) (When an informant claims to have seen controlled substances, the police must also establish that the informant has the requisite expertise in the identification of the particular controlled substances he or she claimed to identify, even when the informant is a police officer).

When Deputy Grasseth went to the Ecklund home with the intent of trying to find someone with authority to consent to a search of the travel trailer for a marijuana grow, he was doing precisely what the court in *Ferrier* ruled were required special warnings formulated in that case. However, in the case at bar, the trial court ruled that *Ferrier* did not apply in this case because of the holdings in *State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000), and *State v. Tagas*, 121 Wn.App. 872, 90 P.3d 1088 (2004). As the following review of these cases reveals, the trial court's holding was in error.

In *State v. Williams*, *supra*, a defendant convicted of possession of heroin appealed his conviction, arguing that the trial court erred when it denied his motion to suppress based upon his argument that when the police obtained consent to enter the home where he was staying in order to arrest him on an outstanding warrant, they should have given the person giving consent *Ferrier* warnings. However, the Washington Supreme Court rejected this argument, noting that in *State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999), it had already rejected this claim, holding that *Ferrier* only applied when the police sought permission to enter a home without a warrant in order to look for drugs.

Similarly, in *State v. Tagas*, *supra*, a defendant convicted of cocaine possession argued on appeal that the trial court erred when it denied a suppression motion based upon her argument that when the police offered her

a ride and asked for permission to search her purse for weapons for officer safety, they should have first given her *Ferrier* warnings. As in *Williams,* in this case the court rejected this argument, holding that *Ferrier* only applied when the police sought to obtain consent to search a person's home for drugs without a warrant.

As this review of *Williams* and *Tagas* reveals, neither of these cases supports an argument that *Ferrier* does not apply to the facts of the case at bar. As was already mentioned, in the case at bar, Deputy Grasseth went to the defendant's home with the specific intent of trying to find someone to consent to the search of the travel trailer for drugs, consent which he knew Sheba Ecklund did not have authority to give. Thus, the facts of this case fall squarely within the purview of *Ferrier*. As a result, the trial court erred when it denied the defendant's motion to suppress the evidence that the police seized during the warrantless search of the defendant's home because Deputy Grasseth should have given Mr. Ecklund *Ferrier* warnings but did not.

2. Deputy Grasseth Coerced Consent to Search from Ed Ecklund.

Warrantless searches, such as the one in the case at bar, may also be constitutional if preceded by valid consent. *Washington v. Chrisman*, 455 U.S. 1, 9-10, 70 L.Ed.2d 778, 102 S.Ct. 812 (1982). In order for the consent to be "valid" it must be voluntary. *State v. Shoemaker*, 85 Wn.2d 207, 533

P.2d 123 (1975). In addition, an entry and search made upon consent may be limited or withdrawn at any time. *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976). A consensual search must also be limited to the area covered by the defendant's consent; consequently, any search exceeding the scope of the consent is invalid. *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974).

In order for the consent to be "valid", it must be voluntary. *State v. Shoemaker*, supra. That is, "consent must result from a person's own 'essentially free and unconstrained choice' whose will has not been 'overborne' and whose 'capacity for self-determination [has not been] critically impaired." *State v. Werth*, 18 Wn.App. 530, 534, 571 P.2d 941 (1977) (quoting *Schneckloth v. Bustamonte, infra*). Whether consent was voluntarily given is a question of fact to be determined from the "totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229, 36 L.Ed.2d 854, 862-63, 93 S.Ct. 2041, 2047-48 (1973). The burden is on the State to prove by "clear and positive evidence" that consent was voluntarily obtained. *Shoemaker*, 85 Wn.2d at 210; *State v. Rodriguez*, 20 Wn.App. 876, 582 P.2d 904 (1978).

In determining the voluntariness of consent, the courts consider numerous factors including: (1) whether a *Miranda* warning was given, (2) the coerciveness of the surroundings, (3) the defendant's degree of education and intelligence, and (4) the defendant's awareness of the right to deny

consent. R. Utter, *Survey of Washington Search and Seizure Law*, 11 U.P.S. Law Review 411, 552 (1988) (citing *Shoemaker*, 85 Wn.2d at 212). The following examines some of the cases applying these factors.

In *State v. Shoemaker, supra*, a police officer approached the Defendant after he pulled an old panel van into a drive-in parking lot. After a fairly extensive conversation, a second officer arrived, noticed a roach clip in the front seat of the van, and arrested the Defendant. After reading the Defendant his Miranda rights, the officer stated that it would be a lot easier if the defendant simply produced any contraband he had. In response to this statement, the Defendant handed the officer a baggie of marijuana he had on his person. The officer then told the Defendant that they would search the entire van, and that it would be easier if the defendant told him where any more contraband was located. The Defendant replied that more contraband was located in the spare-tire compartment. Upon searching the spare-tire compartment, the officer found a substantial quantity of marijuana.

In the subsequent prosecution, the Defendant moved to suppress the drugs seized on the basis that he had not voluntarily consented to the search of the van. The trial court denied this motion. From his subsequent conviction the Defendant appealed, and the Supreme Court affirmed, stating as follows:

Although defendant McDirmid had not been advised of his right

> not to consent to the search of the vehicle, he had been given his *Miranda* warnings, which necessarily means that he had been advised of his right to remain silent. Further, in contrast to the situation in *Bumper [v. North Carolina*, 391 U.S. 543, 20 L.Ed.2d 979, 88 S.Ct. 1788 (1968)], McDirmid, as well as defendant Shoemaker, was a college student who presumably had a far greater level of sophistication and education than the black widow whose consent was held to have been involuntary.
>
> Under these circumstances, we do not think that the consent of McDirmid to the search of the trunk of the vehicle fairly can be described as involuntary. In short, there was a valid consent to the search and the fruits thereof were properly admitted into evidence.

State v. Shoemaker, 85 Wn.2d at 212.

By contrast, in *State v. Werth, supra*, the defendant, while in her house, received a call from a dispatcher stating that the police had surrounded her house and that she was to come out with her hands in the air. Two days previous the police had searched the Defendant's home without a warrant and without her consent. The Defendant complied and saw a number of officers in her yard. One of the officers approached her, and stated that they had information that she was hiding an escapee. The Defendant denied the accusation and stated, "Go ahead and take a look." A number of officers then entered the house, located an escapee, and arrested the Defendant on the charge of harboring an escapee.

Before trial, the Defendant moved to suppress on the basis that she had not voluntarily consented to the officers' search of her home. The Court denied this motion, and later convicted the Defendant of the crime charged.

From this conviction the Defendant appealed, claiming that the trial court erred when it denied her pretrial motion. The Court of Appeals agreed, stating as follows:

> In the present case, there were many coercive factors present. Police ordered Werth out of her home and ordered her to keep her hands in plain view. When she emerged from her home, they ordered her away from the door. She saw at least one officer armed with a shotgun. Although the trial judge found as fact that Werth was not under physical police restraint or in custody, the recent case of *State v. Byers*, 88 WN.2d 1, 559 P.2d 1334 (1977), compels us to conclude otherwise. She was under arrest because her "liberty of movement or freedom to remain in the place of [her] lawful choice" (i.e. her home) was under restraint "by conduct reasonably implying that force [would] be used." *State v. Byers, supra* at 5, 559 P.2d 1336, quoting *Kilcup v. McManus*, 64 Wn.2d 771, 777, 394 P.2d 375 (1964). In addition, she was not informed of her right to refuse consent to the search. These circumstances alone were strongly indicative of coercion. In view of the additional circumstance that 2 days before, Werth's home had been searched illegally without her consent, it is apparent that overall, the situation was rife with coercion. She may well have verbalized her consent to the search, but there can be little question that, in her own mind, police were going to search her home with or without her consent.

State v. Werth, 18 Wn.App. at 535.

In light of the foregoing cases, the following facts in the case at bar are relevant. First, at no point during the process of obtaining consent did Deputy Grasseth read Mr. Ecklund his *Miranda* rights.. Second, at the point that the deputy asked for permission to search, he had already presented the fact of the search as a *fait accompli* to Mr. Ecklund. That is to say, he had told Mr. Ecklund that he was going to search with or without his permission.

The purpose of this statement was to coerce Mr. Ecklund into giving consent, and it had the desired effect.

Third, the record in this case reveals that Mr. Ecklund's education stopped at high school. In addition, it does not contain any facts from which the court could conclude that Mr. Ecklund had any specific experience or training in the law of search and seizure. Finally, in this case, the record reveals that Deputy Grasseth did not inform Mr. Ecklund that he could refuse to consent to the search. Neither does the record contain any facts from which the court could conclude that he knew that he had authority to refuse or limit the search. All of these facts strongly support a conclusion that the deputy obtained consent to search under highly coercive circumstances in which any reasonable person in the defendant's situation would believe that resistance was futile. Thus, just as the trial court in *Werth* erred when it found voluntary consent and denied the defendant's motion to suppress evidence, so in the case at bar the trial court erred when it found voluntary consent and denied the defendant's motion to suppress.

3. Deputy Grasseth's Failure to Get the Defendant's Consent Invalidates the Search.

To meet this burden of proving consent, the State must prove three requirements: (1) that the consent was voluntary, (2) that the person granting consent had authority to do so, and (3) that the search did not exceed the

scope of the consent. *State v. Nedergard*, 51 Wn.App. 304, 308, 753 P.2d 526, *review denied*, 111 Wn.2d 1007 (1988); *see also* Robert F. Utter, *Survey of Washington Search and Seizure Law*, 9 University of Puget Sound Law Review 1, 112 (1985). However, if another resident is home, the police must also obtain that person's consent because a search without the second resident's consent violates that person and every other resident's right to privacy under Washington Constitution, Article 1, § 7 except the privacy rights of the consenting person. *State v. Walker*, 86 Wn.App. 857, 941 P.2d 1 (1997). In applying this rule, the police may not rely upon the fact that they were not aware of another resident's presence in the house as an excuse for failing to get that person's consent. *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005).

For example, in *State v. Morse*, *supra*, the police went to an apartment complex and contacted the manager in an attempt to find a person with an outstanding warrant. The manager informed the police that the wanted person had stayed in a particular apartment in the past, but had not been around for about a week. The officers then went to that apartment and knocked on the door. A woman answered and told the police that the wanted person was not in the apartment and had not been there for about a week. Without asking this person's authority over the apartment, the police asked and obtained her permission to search for the wanted person. In fact, the

woman and her husband had been staying in the apartment temporarily with the lessor while their apartment was being painted. After entering, one of the officers walked down the hall to the master bedroom, saw the lessor lying on the bed, told him that he was there to look for the wanted person, and entered. As the officer entered, he saw scales and methamphetamine sitting on a desk. The officer then arrested the lessor.

The lessor of the apartment later moved to suppress the evidence the police had seized, arguing that (1) the officers' warrantless search into his apartment violated his right to privacy under Washington Constitution, Article 1, § 7, and (2) that the temporary residents to his apartment did not have authority to consent to a search of his bedroom. The state responded that (1) for the purposes of obtaining consent, the lessor was not present until the officer first found him and determined his relationship to the apartment, (2) that the temporary residents had the apparent authority to consent to a search of the whole apartment, and (3) that the lessor's failure to object when he saw the officer and heard what he intended to do constituted a consent to search. The trial court denied the motion and the defendant was convicted. He then appealed. However, the court of appeals affirmed the denial of the suppression motion, holding in an unpublished opinion that the temporary residents had the actual and apparent authority to consent to the search of the whole apartment, and that because the lessor did not explicitly object to the

search, the police did not have to secure his consent before entering his bedroom. Following this decision, the defendant sought and obtained review before the Washington Supreme Court.

In addressing the defendant's arguments, the Supreme Court first noted that the applicable test under the Fourth Amendment is whether or not the police acted reasonably in obtaining consent of a person who had the "apparent authority" to consent. If they did, then the search does not violate the defendant's rights under the United States Constitution, Fourth Amendment. The court then went on to note that the test under Washington Constitution, Article 1, § 7, is different, given the added protections found in the state constitutional provision. In so holding, the court rejected the state's argument that the defendant was not "present" in the apartment unless and until the police found him. The court held:

> The State argues that Dangle had common authority to consent to a search of the premises and that when they came upon Morse, the police officers had no duty to obtain his consent. The State argues that it was Morse's affirmative duty to explicitly object to the search. It is essentially the State's position that Morse was not present in his own apartment until police found him. While such a suggestion may make sense from the perspective of the Fourth Amendment's "reasonableness" requirement, simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article I, section 7.
>
> We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that

> they may refuse to consent, revoke consent, or limit the scope of consent. We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

State v. Morse, 156 Wn.2d at 13 (citations omitted).

The court then went on to reverse the Court of Appeals decision, holding that (1) the temporary resident did not have the authority to consent to a search of the defendant's bedroom and (2) that the search was invalid because the police did not obtain the defendant's permission to search. The court's conclusions on these issues were as follows:

> The Washington Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of law. Warrantless searches are per se unreasonable. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a search. The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. "Presence" is used according to its ordinary meaning. A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be

> authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.

State v. Morse, 156 Wn.2d at 14-15 (citation and footnote omitted).

The decision in *Morse* has direct application to the facts in the case at bar. In this case, Deputy Grasseth had the opportunity to obtain the Defendant's consent to search the travel trailer when the defendant called his father prior to the search. In fact, Deputy Grasseth did actually communicate with the defendant during that telephone conversation when he asked Mr. Ecklund to tell the defendant to return home. Mr. Ecklund complied with the request, as did the defendant. Thus, the failure to seek the defendant's consent when the Deputy had the opportunity vitiates the search.

In addition, the search in this case fails for the more fundamental reason that Mr. Ecklund did not have the authority to consent to it. He was not a co-tenant in the travel trailer. Rather, he was simply the owner who had provided the trailer for a number of years for the defendant's exclusive use. Under Washington Constitution, Article 1, § 7, the validity of a cohabitant's consent to a search is determined under the "common authority" rule. *State v. Morse*, 156 Wn.2d at 7. Washington case law bases this rule on theories of "reasonable expectations of privacy" by the searched individual and "assumption of risk" of a search. *Id.* To qualify as a cohabitant for purposes of common authority, a person must possess equal control over the premises.

State v. Morse, 156 Wn.2d at 18 (citing *State v. Thompson*, 151 Wn.2d 793, 805, 92 P.3d 228 (2004)).

In this case, Mr. Ecklund never did claim to be a tenant or a cotenant in the motor home. Rather, he was simply the owner who provided the trailer for his son's exclusive use as his son's home. He did say that he had "access whenever he wanted," Finding of Fact No. 1.2 at CP 33, however, he did not claim that he lived in the trailer or even normally went inside it. Under these circumstances, it would be unreasonable to conclude that the defendant assumed the risk of his father's consent to a search of what was his exclusive place of abode. Thus, in the case at bar, the trial court erred when it found that Mr. Ecklund had the authority to consent to the search of the travel trailer. As a result, this court should reverse the defendant's conviction and remand with instructions to grant the defendant's motion to suppress.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT SENTENCED HIM FOR AN OFFENSE WITHOUT A FINDING OF GUILT BY THE TRIER OF FACT.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391

U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It is also axiomatic that the trial court only has authority to sentence a person for a crime for which the person was convicted by the trier of fact. *Id.* Thus, for example, if a jury is unable to return a verdict on a particular charge, the trial court in its discretion may declare a mistrial. *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). While the failure to render a verdict leading to a mistrial does not necessarily terminate jeopardy and prevent a retrial, the court has no authority to sentence a defendant without the trier of fact first rendering a verdict of guilt. *State v. Castillo*, 144 Wn.App. 584, 183 P.3d 355 (2008) (court has no authority to impose a punishment such as community custody unless the defendant is convicted of an offense for which the legislature authorized the punishment).

In the case at bar, the state charged the defendant with two offenses: (1) "Possession with Intent to Manufacture or Deliver Marijuana," and (2) "Use of Drug Paraphernalia." The former charge is a mishmash of the three separate crimes of possession of a controlled substance with intent to deliver, delivery, and manufacture. While the language is convoluted, the defendant in this case cannot claim prejudice from the language as the information does charge manufacture of marijuana however poorly. In any event, the law makes no distinction among the three offenses, and the court did find the defendant guilty of count one following his stipulated facts trial. However,

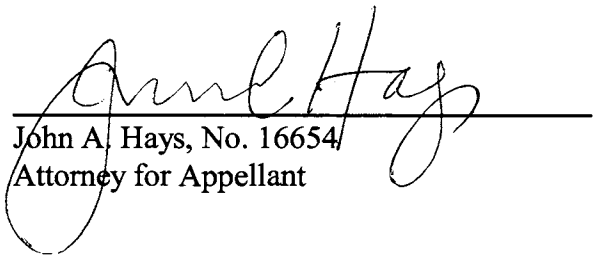
the court did not render a verdict on Count II. In fact, the court did not even mention it in its written verdict. Thus, the trial court erred when it sentenced the defendant on this second charge. As a result, this court should vacate the defendant's conviction on Count II.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress. As a result, this court should vacate the defendant's convictions and remand with instructions to grant the motion. In the alternative, this court should vacate the sentence in Count II as the defendant was not found guilty on this charge.

DATED this 23RD day of June, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

UNITED STATES CONSTITUTION,
FOURTH AMENDMENT

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 and things to be seized.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

FILED
COURT OF APPEALS
DIVISION II

09 JUN 26 AM 11:27

STATE OF WASHINGTON
BY_____
DEPUTY

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

STATE OF WASHINGTON, **Respondent,** **vs.** **ECKLUND, Leif,** **Appellant.**	**NO. 08-1-00001-5** **COURT OF APPEALS NO: 38650-0-II** **AFFIRMATION OF SERVICE**

STATE OF WASHINGTON)
) : **ss.**
County of Wahkiakum)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **June 23rd, 2009** , I personally placed in the mail the following documents

1. AMENDED BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

to the following:

MR. DAN BIGELOW
WAHKIAKUM CTY PROSECUTING ATTY
P.O. BOX 397
CATHLAMET, WA 98612

LEIF ECKLUND
P.O. BOX 72
CATHLAMET, WA 98612

Dated this 23RD day of JUNE, 2009 at LONGVIEW, Washington.

Cathy Russell

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084