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I. ARGUMENT & AUTHORITIES IN REPLY TO STATE'S BRIEF

In its Brief of Respondent, the State asserts that Dalphine Hoopii consented to any random search of the registration information because the text of the following Fife Municipal Code provision was posted at the registration desk:

A. The operator of any facility held out to the public to be an inn, hotel, motel or other public lodging place where sleeping accommodations, with or without meals or cooking facilities, are provided for the use of transient guests shall be required to comply with the terms of this chapter.

B. The facility operator and the clerk, at the time of registration, are responsible for obtaining the name, current address, number of people, and the make, model and license number of the vehicle being used by the registering guest, unless payment is to be made by pre-approved company direct billing or by credit card. Verification of the customer's name and address should be provided by obtaining a copy of a valid driver's license, passport, or other form of government approved picture identification. The records required by this section shall be kept available for inspection by any police or code enforcement officer at any reasonable time, or in a police or fire emergency at any time of day or night.

Fife Municipal Code 5.34.010. (Brief of Respondent at 31; 09/02/09 RP 91) The trial court did not make any finding or conclusion relating to consent (CP 59-64; 09/02/09 RP 97-98), and the State's attempt to raise this alternative ground on appeal should be rejected.

First, the Fife Municipal Code places a requirement on motels and hotels to collect specific personal information of all registered guests, and to provide that information to police when requested. Fife Municipal Code 5.34.010. But the ordinance alone does not overcome or override an individual's constitutionally protected privacy interests. Either a warrant or a valid exception to the warrant requirement is still required.

Consent is one narrowly drawn exception to the warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (citing State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996)). The State has the burden of proving that the defendant's consent to a search was valid by clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); Ferrier, 136 Wn.2d at 111.

To show that consent to a search is valid, the prosecution must prove that the consent was freely and voluntarily given. See State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)). Additionally, in Ferrier, the Court concluded that an essential element of consent to the search of a dwelling is

knowledge of the right to refuse consent. Ferrier, 136 Wn.2d at 116 (citing State v. Johnson, 68 N.J. 349, 346 A.2d 66, 68 (1975)).

The state did not establish valid consent in this case. A copy of the relevant Fife code was posted in the Hometel Inn's lobby, on the left side of the long front desk. (09/02/09 RP 72, 76). But there is no evidence that guests are specifically directed to read the code, are given a copy of the code, or are asked acknowledge that they have read and understood the code. (09/02/09 33-34, 76-77) Moreover, the code does not explain that by registering at a Fife motel or hotel, a guest is consenting to a warrantless search of their registry information and thereby relinquishing constitutionally protected privacy rights. Accordingly, the State has not established that Hoopii gave her knowing, informed, and voluntary consent to the disclosure of her registration information.

The State cites Justice Johnson's concurring opinion in State v. Jorden¹ to support its argument that merely posting a copy of the code near the registration area is sufficient to establish notice and waiver of a registrants privacy rights. (Brief of Respondent at 29) It is notable that not one of the remaining eight Justices joined that

¹ State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007).

concurrence. Nevertheless, even applying Justice Johnson's analysis, the method of notice employed by the Homotel Inn is insufficient.

Justice Johnson states that "a patron may consent to waive this constitutional right if the consent is knowing and voluntary." Jorden, 160 Wn.2d at 133. As argued above, the "consent" in this case was not knowing and voluntary. Justice Johnson also states that a lodging place should "put the prospective patron on notice that their records are available to be searched at the whim of law enforcement." The language of the Fife code certainly does not make this clear to the average citizen. 160 Wn.2d at 133.

Finally, the State cites Justice Johnson's comment that a person is "free to go elsewhere" if they do not wish their private affairs to be available for law enforcement inspection. (Brief of Respondent at 29-30) However, Fife's code is not voluntary and applies to all motels, hotels, inns and lodging places within the City of Fife. If a guest needs a place to sleep but does not want to consent to a random suspicionless search of their personal information, they must go to another city. This places a heavy burden on individuals who have limited funds or means of transportation, and unfairly impacts their ability to find lodging.

V. CONCLUSION

The evidence in this case does not establish that a free, voluntary and knowing consent was obtained from Hoopii. The text of the code was posted, but simple posting is insufficient to prove consent. As argued in the Opening Brief, Dalphine Hoopii's convictions should be reversed, and her case remanded with instructions that the evidence seized in the search of her motel room be suppressed.

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CERTIFICATE OF MAILING

I certify that on 09/27/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Stephen Trinen, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Dalphine Hoopii, DOC# 763786, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, WA 98332-8300.



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