

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

NO. 40604-7-II

STATE OF WASHINGTON,

Petitioner,

Vs.

MICHAEL A. PALMAS,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
10 NOV -1 AM 10:12
STATE OF WASHINGTON
BY _____
DEPUTY

BRIEF OF PETITIONER

From the Superior Court of the State of Washington for Mason County

The Honorable Toni A. Sheldon, Suppression Hearing Judge

Case No. 09-1-00279-7

MICHAEL K. DORCY, WSBA NO. 31968
Mason County Prosecutor's Office
Deputy Prosecuting Attorney
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Ph: 360.427.9670 ext. 401

01-62-01 mhd

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I. ASSIGNMENT OF ERROR

1. The trial court committed error by making Finding of Fact #V, specifically that the knock and talk procedure “is usually done during the daylight hours”, because that finding of fact is not supported by substantial evidence.

2. The trial court committed error by making Conclusion of Law #II, that the defendant’s consent to the search of his home was not voluntary, because that legal conclusion is not supported by the court’s findings of fact.

3. The trial court committed error by making Conclusion of Law #III, that the defendant’s consent to the search of his home was not voluntary in that the knock and talk between the Mason County Sheriff’s Officer’s and the defendant was done at 3:00 AM, because the conclusion of law is not supported by the court’s findings of fact.

4. The trial court committed error by making Conclusion of Law #IV, that the defendant’s consent to the search of his home was not voluntary because the “normal procedure” is to go to a person’s residence and talk to them during the daylight hours and this “specifically was done at 3:00 AM on a cold day in October”, because the conclusion of law is not supported by the court’s findings of fact.

5. The trial court committed error by making Conclusion of Law #V, that the defendant’s consent to the search of his home was not voluntary

“as he was dressed in his tank top, athletic shorts and slippers and had just awakened from sleep”, because the conclusion of law is not supported by the court’s findings of fact.

6. The trial court committed error by making Conclusion of Law #VI, because the statement contained therein is not a conclusion of law.

7. The trial court committed error by making Conclusion of Law #VII, that the defendant’s consent to the search of his home was not voluntary and that the State had failed to show by clear and convincing evidence that any such consent was voluntary, because the conclusion of law is not supported by the court’s findings of fact.

8. The trial court abused its discretion when it granted the defendant’s motion to suppress evidence based on an unlawful search and seizure.

II. ISSUE PRESENTED

Did the trial court abuse its discretion when it ordered suppression of evidence based upon an invalid consent search, when the defendant was properly advised of his rights regarding consent to search his home under State v. Ferrier, 136 Wash. 2d 103 (1998), where he acknowledged his understanding of those rights and affirmatively waived them, merely due to the time of day that consent to search was sought by law enforcement?

III. STANDARD OF REVIEW

This court reviews a trial court's findings of fact in a motion to suppress for substantial evidence. State v. Mendez, 137 Wash.2d 208,

(1999). Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wash.2d 738, (2003). This court reviews a trial court's conclusions of law de novo. Id. The court's conclusions of law must be supported by its findings of fact. State v. Dodson, 110 Wash.App. 112, 123, (2002).

IV. STATEMENT OF THE CASE

A. PROCECURAL HISTORY

The defendant was charged by information with Possession of a Controlled Substance (marijuana) with Intent to Deliver on July 28, 2009. CP3. He was arraigned on October 26, 2009 after a warrant for his arrest had been quashed. The trial court conducted a suppression hearing pursuant to the defendant's motion to suppress on March 18, 2010 and March 22, 2010. RP1-119.

On March 22, 2010 the trial court orally granted the defendant's motion to suppress evidence, and the case was dismissed without prejudice on April 5, 2010. Subsequently, on September 27, 2010, while this appeal was pending, the trial court entered its Findings of Fact and Conclusions of Law.¹

¹ For this court's convenience, attached as Appendix A is a copy of the trial court's Findings of Fact and Conclusions of Law entered below.

B. SUBSTANTIVE FACTS

On October 22, 2008 Detective Sgt. Borcharding, Detective Ledford, Detective Noyes and Detective Valley, each of the Mason County Sheriff's Office (MCSO) arrived at 4171 W. Dayton Airport Road. R11. The intent of the officers was to conduct a "knock-and-talk" with the occupant of the premises, the defendant herein, MICHAEL A. PALMAS, and to request a voluntary consent to search the home. RP11. The MCSO detectives had answered a phone call to the cell phone of another suspect during the execution of a search warrant and spoke with Mr. Palmas, who was soliciting to sell marijuana to that suspect. RP7-11.

Upon arrival at 4171 W. Dayton Airport Road, the detectives approached the front door and knocked. RP11-12. Ultimately, the defendant answered the door, and upon opening the door Detective Sgt. Borcharding could immediately detect the strong obvious odor of marijuana from inside the residence. RP12. Detective Sgt. Borcharding's training and experience as a law enforcement officer, specifically in the area of drug investigations, has included both training and experience in detecting and recognizing the odor of marijuana. RP12. Detective Sgt. Borcharding advised the defendant of the reason they were at his home. Detective Sgt. Borcharding advised the defendant specifically that it was he with whom the defendant had spoken earlier in the evening when the defendant called the cell phone of the other suspect. RP13.

Detective Sgt. Borcharding then asked if the defendant would voluntarily step outside to and speak with him, and the defendant agreed. RP14. While outside, Detective Sgt. Borcharding asked the defendant how much marijuana was inside the home, and the defendant indicated that he had “two or three quarter-pounds about.” RP15. Detective Sgt. Borcharding then asked the defendant if he would voluntarily consent to a search of his home to seize the marijuana. RP15. The defendant inquired as to whether the detectives intending to arrest him and obtain a warrant if he did not consent. RP15. Detective Sgt. Borcharding specifically advised the defendant that if he did not consent, the detectives would “most likely apply for a search warrant”, but that he did not intend to arrest the defendant based upon the amount of marijuana represented, regardless as to whether he consented to the search or not. RP15-16. The defendant agreed to consent to the search, and Detective Sgt. Borcharding reviewed with him a Mason County Sheriff’s Office Voluntary Permission to Search form. RP15-20.

A copy of the form, bearing the signature of the defendant and that of Detective Sgt. Borcharding, is attached hereto as Appendix B. Specifically, the form advises the defendant that he may refuse to consent to a search, that he can withdraw or revoke consent to search at any time, that he can limit the scope of the consent to certain areas of the premises, and that he understands any evidence discovered may be used against him

in court. Finally, the form is signed by the defendant, affirmatively giving consent to the detectives to conduct a search of her entire residence.

During the investigation, prior to responding to the defendant's home, detectives had confirmed that the defendant was gainfully employed by the Little Creek Casino. RP9. At all times during their contact with the defendant, the defendant conversed intelligently with the detectives, and at no time did he appear confused or under the influence of any drug. RP18-19.

V. ARGUMENT

When a search based upon consent is challenged, the burden is on the state to prove by clear and convincing evidence that a defendant's consent to search his home was given voluntarily. State v. Shoemaker, 85 Wash.2d 207, 533 P.2d 123 (1975).

In the case below, the defendant did not contest that he signed the Mason County Sheriff's Office Voluntary Consent to Search form during his contact with detectives at his home on October 22, 2008. Rather, he contends that his consent, although given after an advise of rights and waiver in compliance with the requirements under State v. Ferrier, 136 Wash. 2d 103 (1998), was nonetheless obtained under duress or coercion and therefore not voluntary. In this context, "Whether consent to search was voluntary, and thus valid, or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality

of all the circumstances.” State v. Raines, 55 Wash. App. 459, 462 (1989)(quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)(internal quotation marks omitted).

The court must consider several factors to determine whether the consent was voluntary: (1) whether Miranda warnings preceded the consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of her right not to consent. State v. Smith, 115 Wash. 2d 775, 789 (1990)(citing State v. Shoemaker, 85 Wash. 2d 207, 212 (1975). None of these factors is dispositive. *Id.*

First, under the circumstances of this investigation the detectives did not read the defendant his Miranda rights prior to discussing the voluntary consent to search the home. However, Miranda warnings are not a prerequisite to voluntary consent. *See* State v. Rodriguez, 20 Wash. App. 876, 880 (1978).

Second, the court will consider the degree of education and intelligence of the consenting person. The defendant was thirty-nine years old at the time of the contact. Here, during the investigation, the detectives learned and confirmed that the defendant was gainfully employed at the Little Creek Casino in Mason County. At all times relevant to this contact the defendant conversed intelligently with the detectives, and at no time did he appear confused or under the influence of any drug. The trial court

specifically found that the defendant appeared to be of average intelligence during the suppression hearing.

Third, the court will consider whether the consenting person had been advised of his right not to consent. Here, the defendant was advised of his right not to consent, as well as his right to revoke consent once given and/or to limit the scope of the consent to certain areas. By his signature on the form, the defendant clearly acknowledges this warning, and voluntarily signed the form granting her consent to search his home.

The defendant's claim here seems to be predicated upon the fact that the contact occurred late at night and that he suffers from certain medical conditions (although it is unclear how those conditions are alleged to have impacted his ability to voluntarily consent to a search in this case). Apparently, faced with the choice between thanking the officers for their time and requiring them to apply for a search warrant versus consenting to the search voluntarily, the defendant chose to consent to the search. This is understandably a "rock-and-hard-place situation", especially in light of the fact that the detectives did possess sufficient information for probable cause to apply for a search warrant.² But even if all of the options available to the defendant were equally unpalatable, "[b]owing to events,

² Once contact was made with the defendant at the front door of his home and the detectives could detect the odor of marijuana coming from inside the house, combined with the information learned earlier in the night, the detectives had both probable cause and a nexus for a search warrant to be issued with respect to the defendant's home. Prior

even if one is not happy with them, is not the same thing as being coerced.” State v. Lyons, 76 Wash. 2d 343, 346-47 (1969). The defendant made a choice, albeit a difficult one, to consent to the search of his home, having been fully advised of his rights, and therefore the consent is voluntary.

The trial court’s findings of fact, with the exception of Finding of Fact #V in which the trial court finds that the knock and talk procedure is usually done during daylight hours, support a legal conclusion that in fact the defendant’s consent to the search of his home was given voluntarily. The trial court relies heavily upon the fact that this particular knock and talk was conducted in the very early hours of the morning, between 2:45 and 3:00 AM.

The detectives from the Mason County Sheriff’s Office went to the defendant’s home to investigate probable cause that the defendant was involved in trafficking marijuana, but they did not have information that would satisfy the nexus requirement of State v. Thein, 138 Wash.2d 133 (1999) between the location of the evidence of the crime and the defendant’s home. Further, the nature of the information learned earlier in the night was such that would suggest the evidence may be dissipating quickly, because the defendant advised the undercover officer that the

to that contact, although probable cause existed for a VUCSA crime, there was no nexus connecting the crime to the defendant’s home such that a search warrant could be issued.

marijuana would sell very fast and that he would try to save some until the next day. The information that would satisfy the nexus requirement for a search warrant to be issued for the defendant's home did not come until the officers were standing on the defendant's doorstep and the door was opened, whereupon they could detect the odor of marijuana.

The trial court seems to take no issue with the fact that, at that point, the officers could have required the defendant to stand outside while they applied for a search warrant, and not even requested consent to search. Instead, the officers gave the defendant a choice, and he exercised his own free will to choose one dissatisfactory alternative over another one. The fact that each alternative available to the defendant was unpalatable should not defeat the defendant's clear voluntary choice of one of them. Further, the fact that the officers gave the defendant a choice, rather than reconsidering the request for consent and going straight for a search warrant, should likewise not defeat what is otherwise clearly voluntary consent to search, notwithstanding the fact that the contact occurred at three o'clock in the morning.

VI. CONCLUSION

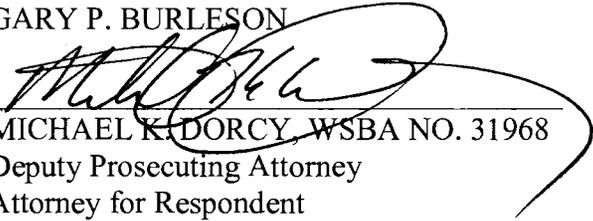
Based upon the foregoing, the trial court's finding of fact relating to the knock and talk procedure usually taking place during the daylight hours is not supported by substantial evidence, and each of the trial court's conclusions law (enumerated above) relating to the voluntariness of the

defendant's consent are unsupported by the findings of fact. The Appellant respectfully asks this Court to reverse the trial court's ruling below on the defendant's motion to suppress evidence.

DATED this 29th day of October, 2010 at Shelton, Washington.

RESPECTFULLY SUBMITTED

GARY P. BURLESON


MICHAEL K. DORCY, WSBA NO. 31968
Deputy Prosecuting Attorney
Attorney for Respondent

FULL
COURT OF APPEALS
DIVISION II

10 NOV -1 AM 10:12
STATE OF WASHINGTON
BY _____
DEPUTY

No. 40604-7-II

STATE OF WASHINGTON,

Petitioner,

Vs.

MICHAEL A. PALMAS

Respondent

Appended Documents
As requested by the Court of Appeals

Mason County 09-1-00279-7-Findings of Fact Conclusions of Law-
App. A
Mason County 09-1-00279-7-Voluntary Permission to Search
Form-App. B

Michael Dorcy
Attorney for Petitioner
WSBA # 31968

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 fax

APP. A

RECEIVED & FILED

SEP 27 2010

PAT SWARTOS, Clerk of the Superior Court of Mason Co. Wash

(A)

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

STATE OF WASHINGTON]	NO. 09-1-00279-7
Plaintiff]	
Vs.]	FINDINGS OF FACT ^{and} CONCLUSIONS
]	OF LAW
MICHAEL A. PALMAS]	
<u>Defendant</u>]	

TAS

THIS MATTER coming on to be heard before the above entitled court on March 18, 2010 for a hearing based upon the motion filed on the behalf of Michael Palmas, and final arguments being heard on the motion to suppress on March 22, 2010 in front of the above entitled court, NOW THEREFORE; The Count enters the following:

FINDINGS OF FACT

I

On the early morning of October 23, 2008, two Mason County Sheriff's Officers went to front door of Michael A. Palmas's residence at 4171 West Dayton Airport Road Shelton, Washington without a search warrant to talk to Mr. Palmas.

TAS

II

On October 23, 2008, at approximately 2:45 in the morning, the two Mason County Sheriff's Officers, detective Sergeant Borcharding and Detective Ledford knocked on Michael Palmas's door. There were 3 other police officers with the 2 officers indicated. ^{Two officers} They knocked on the door and Mr. Palmas came to the door and opened the door and turned

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TAS

in a tank top, athletic shorts and slippers

TAS

TAS

Findings of Fact
Conclusions of Law - p 1

JOHN L. FARRA
 Attorney at Law
 P.O. Box 817
 Ocean Shores, WA 98569
 (360) 289-0918

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on the lights. Michael Palmas had been sleeping before the knock on the door.

III

On October 23, 2008, it was cold outside when Michael Palmas talked to the 2 Mason County Sheriff's Officers. Michael Palmas was dressed in a tank top, athletic shorts and a pair of house slippers.

TAS

IV

Michael Palmas was never advised of any Miranda Rights by any of the police officers. Michael Palmas after having a conversation with the police officers signed the Consent to Search Form.

appears to be of average intelligence. Mr. Palmas was advised of his right to not to consent to the search.

V

Michael Palmas asked the police officers to be allowed to go inside and he was refused that request. The procedure followed by the Mason County Sheriff's Officers was an attempt to obtain permission from Mr. Palmas to enter his residence. ~~and that~~ procedure is usually done during the daylight hours, however on this particular occasion it was done at 3:00AM on October 23, 2008. ~~The procedure followed by the Sheriff's Officers is not the normal procedure in regard to going into a person's residence and attempting to get consent to search a residence for possible contraband; the police officer's wish to follow the knock and talk procedure.~~

VI

The State of Washington has the legal obligation to show that the consent of Michael Palmas was made voluntarily

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and the burden on the State of Washington is to show by clear and convincing evidence that the consent was voluntary.

Based upon the following findings of fact, the court enters the following:

CONCLUSIONS OF LAW

I

The court has jurisdiction over the parties and subject matter herein.

II

That any consent given by Michael Palmas was not voluntary in that the State of Washington has failed to prove by clear and convincing evidence that the consent was voluntary.

III

The consent was not voluntary in that the ^{knock talk} contact between the Mason County Sheriff's Officer's and Michael Palmas was done at 3:00AM on October 22, 2008.

IV

That the consent was not voluntary by Michael Palmas because the normal procedure is to go to a person's residence and talk to them during the daylight hours and this specifically was done at 3:00AM on a cold day in October 2008.

V

The consent of Michael Palmas was not voluntary as he was dressed in his tank top, athletic shorts and slippers and had just awakened from sleep.

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VI

Specifically, the Mason County Sheriff's Officers gave no Miranda Warning to Michael Palmas and Michael Palmas specifically asked to go inside the residence and was refused that request by the Mason County Sheriff's Officers.

VII

That any consent given by Michael Palmas was not voluntary and the State of Washington has failed to show by clear and convincing evidence that any such consent by Michael Palmas was voluntary pursuant to the adoption by the court of the facts indicated herein.

DECISION OF COURT

That the court specifically finds as follows:

I

That the Court has jurisdiction over the subject matter of this case.

II

That the ^{consent to} search ~~by the Mason County Sheriff's Officers~~ was not done voluntarily by Michael Palmas.

TAS

III

That any evidence obtained pursuant to the illegal search on October 23, 2009, must be suppressed as a matter of law.

TAS

Dated this 27 day of ^{September} ~~April~~ 2010.

Tonia Skellern
J U D G E

Presented by: [Signature]
John L. Farra WBA#4164

Approved by: _____
Dory, Deputy Prosecuting

TAS

APP. B

MASON COUNTY
SHERIFF



SPECIAL OPERATIONS GROUP

VOLUNTARY PERMISSION TO SEARCH

I. MICHAEL A. PALMAS 4171 W. DAYTON AIRPORT RD
Name address

SHELTON, WA 98584 7/24/04 being in legal custody or control

of the premises located at 4171 W. DAYTON AIRPORT RD,

SHELTON, WA 98584 and/or vehicle N/A

N/A year/make/model, have been informed that Detective SGT. lic #

BORCHHEIDING of the Mason County Sheriff's Office Special Operations Group would like to search the above indicated premises and/or vehicle(s).

[Handwritten signatures]

- I understand that I may refuse to consent to the search
- I understand that if I consent to the search, I may withdraw or revoke that consent at any time.
- I understand that I may limit the scope of the consent to search to certain areas of the premises and/or vehicle.
- I understand that evidence found during the search may be used in court against me or any other person

I hereby grant permission to search the above listed premises ~~and/or vehicle(s)~~. The search may extend to the entire premises ~~and/or vehicle(s)~~ or the following portions of the premises and/or vehicle(s) ENTIRE PREMISES

This permission is granted without threats or promises of any kind by any law enforcement agency. The granting of this permission is a free and voluntary act.

Signed x [Signature]

Date 10/23/08 Place and Time MASON COUNTY, WA @ 0300

Witnesses [Signature] Mr. Leibel Detective MCSO SOG
print name/title print name/title

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

STATE OF WASHINGTON,)	
)	No. 40604-7-II
Petitioner,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
MICHAEL PALMAS,)	
)	
Respondent,)	
_____)	

I, MARGIE OLINGER, declare and state as follows:

On FRIDAY, OCTOBER 29, 2010, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF PETITIONER,

John Farra
P.O. Box 817
Ocean Shores, WA 98569

10 NOV - 1 AM 10:18
STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION II

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 29TH day of October, 2010, at Shelton, Washington.


MARGIE OLINGER