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No. 40604-7-11

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

STATE OF WASHINGTON
Petitioner

Vs.

MICHAEL A. PALMAS
Respondent

APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR MASON COUNTY

THE HONORABLE TONI SHELTON JUDGE

By:

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ML 12-1-10

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Mr. Palmas was charged by Information with Possession of a Controlled Substance (Marijuana) with Intent to Deliver, allegedly occurring on October 28, 2008. C.P.3. He was subsequently arraigned and the honorable Judge Shelton conducted a Suppression Hearing on March 18, 2010 and on March 22, 2010. R.P.1-119. The respondent, Michael A. Palmas, then subsequently filed a Motion Declaration challenging the police contact and requesting that any evidence obtained pursuant to that illegal contact be suppressed as a matter of law. C.P.12-24. As indicated, thereafter, Judge Shelton conducted a hearing on the Respondent's motion to suppress. This hearing occurred on March 18th and March 22, 2010. R.P.1-119. The court made certain findings of fact and conclusions of law which are consistent with the laws of the State of Washington as far as the motion to suppress being granted by the trial court. On October 22, 2008 officers of the Mason County Sheriff's Office arrived at the residence of the respondent, Michael A. Palmas. It was clear from the testimony that the officer's intended to conduct a knock and

talk. R.P.11. It is also clear for the record that the police officer's, if in fact, they wanted to obtain evidence should have obtained a Search Warrant. R.P.7-11. The contact by the police officer's was at 2:45AM of October 23, 2008. There were 5 police officer's at the residence, two officers knocking on the door. Mr. Palmas came to the door, was dressed in a tank top, athletic shorts and slippers. S.C.P.35 It was event that Mr. Palmas was sleeping before he answered the door and it was a cold morning, Michael Palmas turned on the lights as he opened the door. During the conversation between the Mason County Sherriff's Officer's and Michael Palmas, Michael Palmas was never advised of any of his Miranda rights by any of the police officer's. S.C.P.36. As indicated in the appellant's brief, pursuant to the attachment Mr. Palmas did sign the voluntary permission to search form which was prepared by the Mason County Sheriff's office. S.C.P.38 It is important to note that Michael Palmas asked the police officer's to be allowed to go inside and he was refused that request. S.C.P.362. It was clear from the testimony that the procedure followed by the Mason County Sheriff's Office was the knock

and talk attempt to obtain permission from an individual to enter their residence and this was a standard procedure that was usually done during the daylight hours. S.C.P.36. The trial court, Judge Shelton, clearly indicated that the State of Washington had the legal obligation to show that the consent of Michael Palmas was to be made voluntarily and the burden was on the State to show by clear and convincing evidence that the consent was voluntary. This obviously was not done. S.C.P. 36-37. Judge Shelton ruled as a matter of law that the consent to search was not done voluntarily by Michael Palmas. S.C.P.38. Thereafter any evidence obtained was suppressed as a matter of law. S.C.P.38.

**RESPONSE-ARGUMENT
RESPONSE TO ASSIGNMENT OF ERROR'S 1-8**

ISSUE 1

The appellant, the State of Washington, briefly assigned as error the Findings of Fact Conclusions of Law entered by the court, this is attached as appendix #1 in their Brief and similarly in regard to the Respondent's Brief attached hereto. S.C.P.35-38. The appellant basically assigns as error the

Finding of Fact V. In addition, the appellant then assigns as error under Conclusions of Law II-VII. It is the respondent's position that the appellant's assignment of error and specifically its issue related to those assignments of error is the position of the State of Washington and is erroneous. It should be noted the Judge Shelton did hear the testimony of the individuals and reviewed the facts as to the circumstances of the contact by the Mason County Sheriff's Office with Mr. Palmas to make her ruling. The State of Washington does not challenge the fact that they have the legal obligation to show any consent by Mr. Palmas was voluntary and the State of Washington understands that the Court specifically held that the State of Washington has not shown by clear and convincing evidence that the consent given by Mr. Palmas was voluntary. The argument of the State of Washington basically indicates that Judge Shelton's decision was an abuse of the court's discretion. The trial court, Judge Shelton, clearly indicated the facts and circumstances of this particular case was not consistent with ruling in State vs. Ferrier, 136 Wn. 2d 103 (1998). The State of Washington, the appellant, completely

ignores the relevant facts in reference to the court decision and the intent of the Mason County Sheriff's Officers when they approached Michael Palmas. It is clear in this case that the respondent, Michael Palmas brought this particular legal issue to the trial court's attention pursuant to the proper motion argument and presentation of evidence. The facts clearly indicate that it was non-consensual as Mr. Palmas was illegally held and arrested and coerced into consenting to an illegal search. The case law in the State of Washington indicates that there are certain factors to consider in regard to the consent process. In State vs. O'Neil, 148 Wn. 2d 564 (2003) the Washington State Supreme Court indicated that to have a valid consent to a search there has to be proven by the prosecution that the consent was freely and voluntarily given. They cited State vs. Walker, 136 Wn. 2d 678,(1998) State vs. Bustamante-Davila, 138 Wn. 2d 964 (1999) and State vs. Jensen, 44 Wn.2d 485. As indicated Mr. Palmas was coerced. It is also our position that Mr. Palmas was in custody and not free to leave at any time. It is Mr. Palmas's position that the law clearly indicates that a person has an extreme right of

privacy in his own residence. This has been recognized by case law in the United States Supreme Court, but more specifically applied in the Washington State Constitution. The Washington State Constitution is Article I Section VII. State vs. Jorden, 160 Wn. 2d. 121 (2007). There is another Washington State Supreme Court case, State vs. Day, 161 Wn. 2d 889 (2007), which also indicates that the Washington State Constitution goes further and requires actual authority of law before the State can disturb an individual's private affairs. The State must obtain a warrant before intruding into Mr. Palmas's affairs. The police officers may have had the right to temporarily talk to Mr. Palmas but the detention was illegal and he did not give a voluntary consent. This case must be decided on its own set of facts. Mr. Palmas was not free to leave his porch. The State Supreme Court has clearly indicated that whether consent is voluntary is a question of fact. You must look at the total of the circumstances. The case law indicates that the court may look at whether in fact the officer's have indicated from their position of authority, whether they could have gotten a search warrant and had legal right to search pursuant

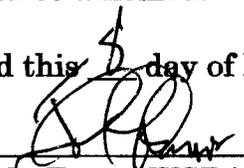
to that search warrant in regard to evaluating the degree of the voluntariness of the consent by a defendant. State vs. Flowers, 57 Wn App. 636 (1990). The general rule in regard to searches are applicable to this case. Warrant-less searches are Per-Se unreasonable under our State Constitution. A warrant-less search violates the Constitution, if the search is not justified by an exception. In this type of case the State of Washington bears the burden of proving that a warrant-less or seizure is justified by recognized exception. State vs. Acrey, 148 Wn. 2d. 738 (2003), which quotes from State vs. Kinzy, 141 Wn. 2d 73 (2000).

CONCLUSION

It is evident that Judge Shelton clearly viewed the facts in this case. This incident occurred in the early morning hours and was commenced by the deficient process of the Mason County Sheriff's Office. The proper procedure was to obtain a search warrant. As indicated this was in a cold early morning cold contact. Michael Palmas was in his underwear and slippers and it was clear that he was not free to leave. Michael Palmas in fact requested to go inside his residence. This was not a

temporary seizure and Judge Shelton clearly set forth in the Findings of Fact and Conclusions of Law that upon her listening to the testimony that the totality of the circumstances violated Michael Palmas's constitutional rights. The State of Washington clearly failed to show that Michael Palmas's consent was made voluntarily. Judge Shelton correctly concluded that the State of Washington had failed to prove by clear and convincing evidence that the procedure was legally correct. For the Court of Appeals to reverse Judge Shelton's opinion the Court of Appeals would have to ignore Judge Shelton's observations and conclusions. The State of Washington has failed to do this and Judge Shelton's opinion should be affirmed.

Dated this 5 day of December 2010



John L. Farra, WSBA#4164

Appendix 1

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

J(A)

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

STATE OF WASHINGTON]	NO. 09-1-00279-7
Plaintiff]	
Vs.]	FINDINGS OF FACT, CONCLUSIONS
]	OF LAW
MICHAEL A. PALMAS]	
Defendant]	

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 Court 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.

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. They knocked on the door and Mr. Palmas came to the door, and opened the door and turned

in a tank top, athletic shorts and slippers

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Findings of Fact
Conclusions of Law - p 1

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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.

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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 to every intelligent Mr. Palmas was advised of his right 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 Shelton
J U D G E

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

Approved by: [Signature]
Dory, Deputy Prosecuting

TAS