

NO. 42777-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINE KAY WESTVANG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Stonier, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence seized during a warrantless search of her home.

2. Trial counsel's failure to argue all reasonable grounds for suppression of the evidence denied appellant the effective assistance of counsel.

Issues pertaining to assignments of error

1. When police knocked on appellant's door and told her they were looking for a man for whom they had a warrant, she told them the man was not there. Not believing her, police told appellant they wanted to search her house. They told her she could refuse to consent, but they did not explain that she could revoke her consent at any time or limit the scope of the search. After appellant showed the police through the rooms at the back of her house, one of the officers walked over to a desk in the front room, where he found methamphetamine. Where appellant was not fully advised of her rights regarding the warrantless search of her home, did the search violate article I, section 7 of the Washington Constitution, requiring suppression of the evidence?

2. Although trial counsel moved to suppress evidence seized during the unlawful search, he argued only that appellant did not consent to the search. Did counsel's failure to argue that appellant was not

properly advised of her rights as required under State v. Ferrier¹ deny appellant the effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On April 5, 2011, the Cowlitz County Prosecuting Attorney charged appellant Christine Westvang with possession of methamphetamine with intent to deliver. CP 1-2; RCW 69.50.401(1). The Honorable James Stonier denied Westvang's motion to suppress evidence seized during an unlawful search, and the case proceeded to jury trial. CP 3-5; 66-68. The jury returned a guilty verdict, and the court imposed a standard range sentence. CP 64, 74. Westvang filed this timely appeal. CP 82.

2. Substantive Facts

On March 31, 2011, law enforcement officers working as members of the Career Criminal Apprehension Team were conducting a fugitive sweep in Cowlitz County, seeking to execute an arrest warrant for Scott Miller. RP² 2-3. During their investigation they were given information that he was frequently at an address on Baltimore Street in Longview. RP 3-4, 16. The team headed to that address to search for Miller. RP 4.

¹ State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

² The Verbatim Report of Proceedings from 6/16/11, 10/3/11 and 10/4/11 is contained in a single volume, designated RP.

Detective Kevin Sawyer walked to the corner of the house, while Detective Spencer Harris approached a sliding glass door. RP 5. Two more officers covered the other side of the house. RP 5, 17. Peeking through the window covering, Harris saw Christine Westvang sitting at a desk. He knocked on the door, and Westvang walked over and opened it. RP 5. Sawyer then joined them at the door. Both Sawyer and Harris were clearly identified as police officers. RP 5-6.

The officers told Westvang they were looking for Miller, and Westvang said he was not there. RP 18. Because Westvang seemed nervous, the officers did not believe her and thought she might be hiding Miller. RP 6. They said they had information that Miller was there, and they wanted to search her house. RP 6-7, 18. Sawyer told Westvang she did not have to consent to a search, but she told them Miller was not there and agreed to let them in. RP 7, 18. Neither officer told Westvang she could end the search at any time or that she could limit it to certain areas of the house. RP 11, 18-19.

Once inside, Westvang led the officers through the rooms in the back of the house, and they saw that Miller was not there. RP 8, 20. When they returned to the living room, Harris walked over to the desk where Westvang had been sitting when they arrived, thinking the desk area was big enough to hide a person. RP 9. On top of the desk he saw a

scale, plastic baggies, and a tin containing a substance later identified as methamphetamine. RP 9, 21. Sawyer read Westvang her Miranda warnings, questioned her about the evidence they found, and placed her under arrest. RP 23-25.

Prior to trial Westvang moved to suppress the evidence seized during the search of her home. CP 3-5. At the suppression hearing, Westvang and a friend who had been present in her home at the time disputed that she consented to the search, saying the officers entered without permission. RP 29-30, 41. Westvang testified that she did not ask the officers to leave once they had entered, because she did not think it would do any good. RP 41. Defense counsel asked the court to resolve the factual dispute in Westvang's favor and suppress the evidence. RP 49.

The State argued that the officers did not coerce or force their way into the house, but rather Westvang consented to the search. RP 49. The State argued that because the officers did not seek entry into Westvang's home to search for controlled substances or evidence of a crime, and they had no reason to suspect they would find drugs, they were not required to advise her of her right to refuse, revoke, or limit consent to the search. RP 11, 22, 51; CP 6-10.

The court found that Westvang had consented to the officers' entry and search of her home. It denied the motion to suppress evidence. RP 54-55.

C. ARGUMENT

I. THE WARRANTLESS SEARCH OF WESTVANG'S HOME VIOLATED HER RIGHTS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Both the state and federal constitutions protect individuals against unreasonable searches and seizures. Const. art. 1 § 7; U.S. Const., amend. IV. "It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Moreover, "[t]his constitutional protection is at its apex 'where invasion of a person's home is involved.'" State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008) (quoting City of Pasco v. Shaw, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), cert. denied, 552 U.S. 1275, 128 S.Ct. 1651, 170 L.Ed.2d 385 (2008)).

A warrantless search is presumed unreasonable, and exceptions to the warrant requirement are limited and carefully drawn. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). The State has the burden of proving that an exception to the warrant

requirement applies. Parker, 139 Wn.2d at 496. Constitutionally valid consent is a recognized exception to warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

In Ferrier, the Supreme Court examined the police practice known as a knock and talk, in which law enforcement officers conducting an investigation seek consent to search a home without a warrant. The knock and talk is used because in most cases where police have information suggesting they should search a home, but no warrant to do so, occupants will provide consent to search if officers simply knock on the door, explain why they are there, and request permission to search. Ferrier, 136 Wn.2d at 107.

The Supreme Court found this procedure inherently coercive:

we believe that the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search. . . .

Ferrier, 136 Wn.2d at 115.

In Ferrier, police had information that Ferrier had a marijuana grow operation in her house. Because they did not have probable cause to obtain a warrant, they conducted a knock and talk. When they knocked on

Ferrier's door and identified themselves as police officers, she invited them in. Once inside, the officers told Ferrier they had information about a marijuana grow operation and that they wanted to search her house. She was asked to consent to a search, and she signed a consent form, but she was never told she had a right to refuse consent, nor was she informed of any other rights. Ferrier, 136 Wn.2d at 107-8.

The Supreme Court held that this procedure violated Ferrier's right to privacy under article I, section 7 of the Washington constitution. The Court noted that, unlike the Fourth Amendment, the Washington constitutional provision "clearly recognizes an individual's right to privacy with no express limitations." Ferrier, 136 Wn.2d at 110 (quoting State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)). The Court recognized further that "[i]n no area is a citizen more entitled to his privacy than in his or her home." Ferrier, 136 Wn.2d at 112 (quoting Young, 123 Wn.2d at 185).

Applying these principles, the Court concluded that the police violated Ferrier's state constitutional right to privacy in her home by conducting a knock and talk in order to search her home without obtaining a warrant, because they did not first advise her of her rights to refuse consent, to withdraw consent, or to limit the scope of the search. Ferrier, 136 Wn.2d at 115, 118-19. It adopted 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.

Ferrier, 136 Wn.2d at 118-19.

In subsequent cases the Supreme Court made clear that the Ferrier rule only applies when police seek entry into a home to conduct a warrantless search. State v. Khounvichai, 149 Wn.2d 557, 563, 69 P.3d 862 (2003); State v. Williams, 142 Wn.2d 17, 28, 11 P.3d 714 (2000); State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). The Court found “a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes.” Khounvichai, 149 Wn.2d at 564. “[T]he Ferrier warnings target searches and not merely contacts between the police and individuals.” Id.

Thus, in Khounvichai, where police requested entry into a home to speak to one of the residents, no Ferrier warnings were required because the officers did not seek consent for a warrantless search. Khounvichai, 149 Wn.2d at 566-67. And in Bustamante-Davila, where police accompanied INS agents into the defendant’s home to execute a

deportation order, the defendant did not need to be advised of his right to refuse entry, because the officers did not seek to search the home. Bustamante-Davila, 138 Wn.2d at 980-81.

Similarly, in Williams, police were not required to give Ferrier warnings before entering a home to arrest the defendant, a guest of the occupant, on a warrant, because they did not seek consent to search the home. Williams, 142 Wn.2d at 27-28. While in this case police were also seeking to execute an arrest warrant when they went to Westvang's home, there are crucial distinctions between the facts here and those in Williams.

In Williams, police told the occupant of the apartment that they were looking for the defendant, and they saw the defendant's car in the parking lot. The occupant said he had a guest, but he knew the guest by a different name. He allowed the police to enter the apartment to confirm the identity of the guest. Williams, 142 Wn.2d at 27. The Supreme Court held that Ferrier warnings were not required, noting that "the police officers did not seek to enter [the] apartment to look for contraband or to arbitrarily search a home for a hidden guest." Id. Because the police did not request permission to search the premises, the situation did "not resemble a 'knock and talk' warrantless search that Ferrier intended to prevent." Id.

Here, on the other hand, there was no evidence corroborating the information that Miller was in Westvang's house, and Westvang demonstrated no confusion as to who Miller was or whether he was inside. She told officers she knew Miller and she unequivocally denied that he was there. RP 6, 18. The police simply refused to take her word for it. Most importantly, police presence in the home was not limited to verifying the identity of those present. Detective Sawyer specifically told Westvang they wanted to search her home for Miller, and they went through the entire house looking for him. RP 18, 20. Because the police were seeking to "arbitrarily search a home for a hidden guest," the procedure here was more like the knock and talk warrantless search in Ferrier than the constitutionally acceptable intrusion in Williams. Williams, 142 Wn.2d at 27.

The court below appears to have drawn a distinction between the warrantless search of a home for a person and a warrantless search for other evidence. In denying the motion to suppress, the court concluded, "The officers were at the Defendant's residence for a legitimate investigatory purpose. They were not there searching for drugs; rather, they were searching for Mr. Miller, who had an active DOC warrant." CP 67 (Conclusion of Law 1).

There is no such distinction under the more limited protections of the Fourth Amendment. “In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (emphasis added); see also Payton, 445 U.S. at 588 (“an entry to arrest and an entry to search for and seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.”).

There is no valid reason to draw such a distinction under the greater protections of article I, section 7, either. The Supreme Court’s focus in Ferrier was on the heightened constitutional protection of privacy in the home. See Ferrier, 136 Wn.2d at 118 (“We believe that the expectation of privacy in the home is clearly ‘one which a citizen of this state should be entitled to hold,’” (quoting City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994), and “In light of the importance that we attach to that right in Washington, ... article I, section 7 is violated whenever the authorities' fail to inform home dwellers of their right to refuse consent to a warrantless search.”) These same considerations are present whether police seek to conduct a warrantless search for physical

evidence or a warrantless search for a person suspected of criminal activity.

While the officers in this case did not seek to gain entry to search Westvang's home for drugs, neither did they merely seek to question an occupant or identify a guest. The police were acting on unverified information that Miller was in the house, and when Westvang denied he was there, the police asked to come in and search her home for him. RP 18. This request by the police impacted Westvang's privacy interest in her home in the same way that the request to search for marijuana in Ferrier did.

The evidence in this case also demonstrates that the coercive aspects of a knock and talk identified in Ferrier were present. See Ferrier, 136 Wn.2d at 115. The officers noticed that Westvang was nervous when they questioned her at her door. RP 6. Westvang testified that even though the officers did not raise their voices or pull their guns, she was intimidated by the fact that they were there and asking to search her home. RP 43. Moreover, she did not ask the officers to leave once they were inside because she did not think it would do any good. RP 41. While she was told she could refuse to let them search, she did not know that she could revoke her consent at any time or that she could limit the search to certain areas of her house. Without this information she could not make a

reasoned decision about whether to allow the search or whether to let it continue after the officers looked through the back rooms and headed toward the living room and her desk.

Division Three of the Court of Appeals has held that Ferrier warnings were required when law enforcement sought warrantless entry of a residence to search for a person. State v. Freepons, 147 Wn. App. 689, 197 P.3d 682 (2008), review denied, 166 Wn.2d 1008 (2009). In Freepons, deputies were investigating a one-car accident when they discovered the 19-year-old owner of the car nearby. He smelled of intoxicants, and he admitted he had been drinking at a party, but he denied any knowledge of the accident. He said that his brother, who also attended the party, might have taken the car. Freepons, 147 Wn. App. at 691.

Eventually, the deputies ended up at the house where the party had occurred, and Freepons and another man answered the door. Deputies told the men about the accident and who they were looking for. The men said he was not there but allowed the deputies into the house to look for him. Freepons, 147 Wn. App. at 692. Once inside, the deputies discovered a marijuana grow operation. Id.

On appeal, a majority of the Division Three panel found that because the deputies' purpose in trying to find the driver was related to

their criminal investigation involving the car accident, deputies were searching for evidence of a crime and were required to provide the men with Ferrier warnings before seeking consent to search the home. The failure to do so required reversal. Freepons, 147 Wn. App. at 694-695.

Judge Brown dissented, arguing that no warnings were necessary because the officers did not seek entry into the home to search for evidence of crimes involving the appellants and that there was insufficient time to obtain a warrant. Freepons, 147 Wn. App. at 695-696 (Brown, J., dissenting). The Supreme Court apparently agreed with the majority, as it denied the State's petition for review. See State v. Freepons, 166 Wn.2d 1008, 208 P.3d 1124 (2009).

This Court should likewise hold that when officers seek to conduct a warrantless search of a home, whether for physical evidence or for a suspect, the failure to give Ferrier warnings violates article I, section 7 of the Washington Constitution and vitiates any consent given. Because Westvang was not fully advised of her rights regarding the warrantless search of her home, the consent obtained was invalid, and evidence seized during the unlawful search must be suppressed. See Ferrier, 136 Wn.2d at 119. Since there is no other evidence to support the charge against her, the charge must be dismissed.

2. IF TRIAL COUNSEL'S MOTION TO SUPPRESS FAILED TO FULLY PRESERVE THE ISSUE FOR REVIEW, WESTVANG WAS DENIED HER CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

While trial counsel moved to suppress evidence discovered during the search of Westvang's home, he argued only that Westvang did not give police permission to enter the house. CP 3-5; RP 49. He did not argue that any consent Westvang gave was invalid because she was not given Ferrier warnings.

Nonetheless, the State attempted to distinguish this case from Ferrier in its response by pointing out that the officers sought to enter Westvang's house to arrest Miller on a valid warrant, not to search for contraband. CP 8-9. The prosecutor also pointed out that Westvang was informed she could refuse to let the officers in her house. RP 50. And the Court concluded that Westvang's consent was valid, relying on the fact that the officers were not searching for drugs but for Miller. CP 67. Because this issue was presented to and addressed by the trial court, it is preserved for appeal.

Even if trial counsel failed to preserve the issue on appeal, reversal is required. The failure to raise all available grounds for suppressing evidence seized during the search of Westvang's home constitutes ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

A defendant is denied his right to effective representation when his attorney’s conduct “(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

"A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision." State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." Id.

As argued above, Ferrier and its progeny hold that a homeowner must be fully advised of his or her rights regarding consent before a warrantless search of the home may be conducted. Moreover, when police fail to give Ferrier warnings, any consent is vitiated and evidence seized during the search must be suppressed. Ferrier, 136 Wn.2d at 118-19. Because police searched Westvang's home without a warrant and without advising her of her right to revoke or limit her consent, all evidence seized during the search should have been suppressed. Trial counsel's failure to argue that the Ferrier rule applied to the search of Westvang's home constituted deficient performance.

Prejudice is established where there is a reasonable probability the trial court would have granted the suppression motion. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). A properly argued motion to suppress evidence from a warrantless search of the home where no Ferrier warnings were given would have succeeded for the reasons set forth above. Prejudice is therefore established. Westvang was denied effective assistance of counsel, and her conviction must be reversed and the charge dismissed.

D. CONCLUSION

Westvang's right to privacy in her home under article I, section 7 was violated by the warrantless search. Evidence seized during that search must be suppressed and the charge against Westvang dismissed.

DATED this 12th day of March, 2012.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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Today I forwarded a copy of the Brief of Appellant in *State v.*

Christine K. Westvang, Cause No. 42777-0-II to:

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Belfair, WA 98528

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