

NO. 44922-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSÉ BERNAL MARTINEZ,

Appellant.

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

APPELLANT'S CONSOLIDATED REPLY BRIEF

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A. SUMMARY OF REPLY

José Bernal Martinez appeals from his conviction for a single count of possession of a controlled substance with intent to deliver. In the opening brief on direct appeal, he argues the evidence seized in his apartment should have been suppressed because (a) his houseguest lacked authority to consent where he did not know the address of the apartment, had stayed in the apartment only one night, asked to use a telephone to call for permission for the police to enter the apartment, and only had a borrowed key to the apartment on a key chain for a vehicle also borrowed from Bernal Martinez or (b) Bernal Martinez's consent was involuntary where prior to obtaining his consent, four or five armed police officers had already entered his apartment, where one of the officers asked him where they could talk, where more officers were poised outside the entryway, where Bernal Martinez's limited education took place in Mexico, where he had no known experience with law enforcement, where *Miranda*¹ warnings were not administered, and where the *Ferrier*² advisements were inaccurately translated into Spanish.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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

Bernal Martinez also filed a pro se personal restraint petition raising several issues. This Court ordered the State to file a consolidated response brief addressing both the direct appeal and personal restraint petition. Bernal Martinez, through counsel, now replies to the State's consolidated response.

B. ARGUMENT IN REPLY TO ISSUES RAISED ON DIRECT APPEAL

1. Bernal Martinez's assignments are amply supported by argument.

The State's claim that Bernal Martinez did not support his assignments with argument, case law or explanation is unsupported. Resp. at 7-13. For example, on pages 12 through 13 of the opening brief, Bernal Martinez supports his assertion that findings 12, 14, and 16 are without ample support based on evidence in the record and case law. The assignment of error to findings 9, 15, 24, and 15 are likewise supported at pages 16 through 17 of the opening brief. These arguments address all the findings to which error are assigned in the opening brief. Challenges to the conclusions of law are also amply supported in the opening brief. The State's argument is unfounded.

The State also challenges Bernal Martinez's assertion that any consent was not sufficient in light of Detective Hall's poor translation

of the *Ferrier* warnings. Resp. at 11-12. At least with regard to Hall's Spanish-language capabilities, Hall's poor translation of the warnings defies the State's argument and the court's finding that Hall "is a fluent Spanish speaker." See CP 36 (FF 9); Resp. at 11-12. The State also criticizes Bernal Martinez for raising the issue for the first time on appeal and citing matters outside the record. But Bernal Martinez challenged the sufficiency of his consent, and the propriety of the search, at the trial level. He adequately assigns error on appeal to the trial court's finding of fact. Moreover, Bernal Martinez cites to online sources comparable to a dictionary to point out the errors in Hall's translation. Our courts regularly cite to the dictionary and online sources, and the State itself cites to online sources in its response. See, e.g., *State v. Homan*, ___ Wn.2d ___, 330 P.3d 182, 186 (2014) (citing to dictionary for statutory interpretation); *First Citizens Bank & Trust Co. v. Harrison*, ___ Wn. App. ___, 326 P.3d 808, 813 (2014); *Austin v. Ettl*, 171 Wn. App. 82, 91 n.10, 286 P.3d 85 (2012) (citing to a "a Google search"); Resp. at 44-45.

For the additional reasons set forth in his Opening Brief, Bernal Martinez maintains that the trial court's findings are not supported by substantial evidence.

2. Bernal Martinez's guest for a single night, Ponce-Gutierrez, lacked authority to consent to a search of Bernal Martinez's apartment.

The State argues that Bernal Martinez cannot challenge Ponce-Gutierrez's authority to consent for the first time on appeal. However, Bernal Martinez does not raise this issue for the first time on appeal. In his argument at the suppression hearing, Bernal Martinez specifically contested Ponce-Gutierrez's authority to consent to a search. RP 220-21. Further, Bernal Martinez objected generally to the trial court's findings of fact. CP 38 (FF 28). He preserved for appeal his objection to the denial of his suppression motion. And the trial court ruled specifically on Ponce-Gutierrez's authority to consent to the search. CP 36-38 (FF 15, 16, 19-21, 25), 38 (CL 3). Thus, the State had adequate opportunity to address this issue below and this Court has a sufficient ruling to review.

Turning to the substance of the State's argument, notably, the State does not acknowledge *State v. Morse*, 156 Wn.2d 1, 5, 123 P.3d 832 (2005), or respond to Bernal Martinez's reliance on that case. *See* Resp. at 15-17; Op. Br. at 11-14, 19. Moreover, the fact that law enforcement watched Ponce-Gutierrez entering and leaving the apartment twice in one day does not equate with authority to consent to

a search of the residence. A houseguest would easily come and go twice in one day. Even more tellingly, so would a cable repairperson or an exterminator. Entering and leaving on more than one occasion on one day does not equate with control or authority over a home equal to that of the homeowner. The police evaded the warrant requirement, although they had time to obtain a warrant, and declined to approach Ponce-Gutierrez while he was at or near the apartment. The police assumed the burden of determining Ponce-Gutierrez's lawful authority to consent to a search of the residence. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998); *Morse*, 156 Wn.2d at 15. And this authority does not turn on Detective Hall's subjective belief. *Morse*, 156 Wn.2d at 5. Thus, Ponce-Gutierrez's isolated assertion that he was the sole occupant and Hall's observation that Ponce-Gutierrez possessed a key to the apartment is not sufficient to presume authority to consent. This is particularly true where a review of the evidence shows Ponce-Gutierrez did not know the address for the apartment, had only stayed in Bernal Martinez's apartment for one night, and told Detective Hall that he needed to make a telephone call because he was not authorized to bring people into the apartment. RP 149-50, 161-62, 163.

This Court should reverse the suppression order because Ponce-Gutierrez lacked authority to consent to a search of Bernal Martinez's residence.

- 3. The search was unlawful on the independent ground that Bernal Martinez's consent was not voluntary where four or five officers were inside his home already, more were outside the door, *Miranda* warnings were not administered, he was asked immediately about weapons and a place to talk privately, and then an officer spoke to him alone for 45 minutes in his small bedroom before obtaining consent.**

The State was also required to prove Bernal Martinez's voluntary consent to a search of his apartment by clear and convincing evidence. *E.g., State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Flowers*, 57 Wn. App. 636, 644-45, 789 P.2d 333 (1990). As argued in the opening brief, a totality of the circumstances shows Bernal Martinez's consent was not voluntary because prior to obtaining his consent, four or five armed police officers had already entered his apartment; one of the officers asked Bernal Martinez where they could talk; more officers were poised outside the entryway to the apartment; Bernal Martinez's limited education took place in Mexico; he had no known experience with law enforcement; *Miranda* warnings

were not first administered; and the *Ferrier* advisements were inaccurately translated into Spanish.

The State argues in response that the *Ferrier* warnings were properly administered and Bernal Martinez did not assert a lack of understanding when they were administered. Resp. at 18-19. But, in light of the circumstances, the fact that Bernal Martinez submitted to the police without expressing a lack of understanding is not determinative. In fact, it further supports the coercive nature. Bernal Martinez stumbled into his hallway to find four or five armed officers in his apartment. He was promptly asked where they could talk to him, and one took him into his bedroom, nearly closing the door but leaving it slightly ajar to the armed officers that remained on the other side. He was administered poorly translated *Ferrier* warnings and no *Miranda* warnings. From Bernal Martinez's perspective, a cadre of officers had simply entered his apartment and made demands of him. He did not understand he could contest their presence, and the circumstances certainly indicated precisely the opposite—he was being dominated by law enforcement in his own home.

As is plain from this reply and Bernal Martinez's opening brief, he relies on substantially more than the "mere presence of police

officers” to consent the voluntariness of his consent. *Compare* Resp. at 20 *with supra*; Op. Br. at 15-18 (discussing nature of interaction with police, location, duration, failure to administer warnings, poor translation of warnings, Bernal Martinez’s background). Nonetheless, the presence of four or five armed police officers inside his home with numerous more just beyond the entryway, is certainly a significant factor.

Finally, the State claims without support that it was clear Bernal Martinez “was not totally naïve in criminal matters.” Resp. at 21, 43. These statements are apparently presented without citation because there is no authority in the record for them. In fact, his offender score of zero indicates precisely the opposite—Bernal Martinez had no prior experience with the criminal justice system. CP 45, 54. The State had the burden to show otherwise below, and it did not do so.

C. ARGUMENT IN REPLY TO ISSUES RAISED IN PERSONAL RESTRAINT PETITION

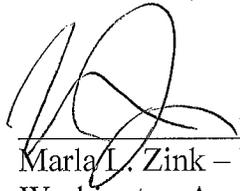
The undersigned counsel has no argument to make beyond those asserted in Bernal Martinez’s pro se personal restraint petition.

D. CONCLUSION

For the reasons set forth above and in Bernal Martinez's opening brief, and for the additional reasons set forth in his pro se personal restraint petition, the conviction should be reversed.

DATED this 25th day of August, 2014.

Respectfully submitted,



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Attorney for Appellant

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)	
Appellant.)	

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