

No. 47927-3-II
Grays Harbor County Superior Court No. 14-1-00454-3

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

CURTIS HORTON,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court's conclusion that Horton, who was sleeping in his RV as a guest on private property, had no privacy interest in his vehicles parked on that property out of plain view, was error.

2. The trial court erred in concluding that the officers did not conduct a search, but were simply within the "curtilage" of the "areas where these RV's were parked."

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Horton was an invited guest on private property did he have a privacy interest or reasonable expectation of privacy and, if so, should the fruits of the warrantless search be suppressed?

2. Did the police conduct an illegal search of the private property when they entered after dark without permission, questioned people present and then proceeded well into the property, 25 yards from the nearest road, 88 feet back from the nearest building on the property, behind a six-foot fence, finally locating Horton's Jeep under some bushes?

III. STATEMENT OF THE CASE

Horton is charged with vehicular assault in violation of RCW 46.61.522(1)(a). CP 1-2. This is an interlocutory appeal of the order denying his motion to suppress the fruits of a warrantless search of private property.

On March 30, 2015, Curtis Horton filed a motion to suppress the fruits of the warrantless search of private property by two park rangers. CP 15-36. The State filed a response. The trial judge did not hold an evidentiary hearing on Horton's motion, but instead relied on the facts as set forth in the parties' written pleadings and then heard argument. The facts set forth below are taken from the written pleadings, which the trial judge said he considered in making his ruling. RP 8.

On August 30, 2013, at 11:30 p.m., Grays Harbor County police received a report of a vehicle rollover accident on the beach near Moclips. When they arrived, however, the vehicle was gone. However, Michael Walls and some others were there. Walls had a gash on his leg and was taken to the hospital. The police deduced that the vehicle Walls was riding in was a Jeep. Walls told them that the driver was named Corey.

Park Ranger, Brad Stabb, left the beach and went looking for a vehicle. The police dispatcher advised him to look at the trailer park nearby. There were no matching vehicles there. He then drove down a private gravel road on private

property to an area filled with recreational vehicles (RVs), about 20 Jeep enthusiasts and various Jeeps. Eventually, Ranger Joe Fernandez joined him in questioning people gathered round the campfire near the trailers. One of the people was Corey Waxman, but he denied driving on the beach that day.

The investigators were not satisfied with the answers they were receiving from those gathered around a campfire on the property. Eventually, Ranger Staab went to poke further around the property. He found some tire tracks and followed them further into the property. Eventually, he found a Jeep concealed by the high brush and a six-foot fence. The Jeep was 80 yards off the roadway and 25 yards from the nearest public road. It was in the middle of the night and the Park Rangers needed flashlights to examine the vehicle.

Using their flashlights, the investigators claimed to see damage to the Jeep consistent with a rollover accident. Ranger Stabb ran the license plate number and learned that the Jeep was registered to Curtis Horton. The Rangers then ran the license plates of all of the other RVs on the private property. One was registered to Horton.

The Rangers regrouped with Trooper Blake and roused Horton in his RV. When he came outside, Horton denied driving the Jeep, but admitted he had keys to the vehicle. Trooper Blake questioned Horton, who continued to say he knew nothing about the accident. He also refused to perform field sobriety tests when asked to do so.

Horton was arrested. The State charged him with Vehicular Assault one year later. CP 1-2.

Prior to trial, Horton moved to suppress the fruits of the search of the private property where he was residing that evening. CP 15-36. He argued that the Trooper and the Park Rangers engaged in an illegal warrantless search of private property and that the Park Rangers had no legal authority to enter the property at all. He pointed out that a warrantless search of private property was per se unreasonable unless the State established an exception to the warrant requirement citing to the Fourth Amendment, Const., Art. 1 § 7; *State v. Hendrickson*, 129 Wn.2d 61, 69-70, 917 P.2d 563, 567-68 (1996). He argued that the officers engaged in a search beyond the areas of the campsite that were open to public view, including the bushes at the back of the property where the Jeep was located.

The State made no argument regarding Const., Art. 1 § 7. Instead, the State argued that under the Fourth Amendment,

there is no evidence that Defendant owned the property that the officers found him on, or that the property was his customary domicile, or any other reason why he should have standing to challenge the officer's entry onto the property.

State's Response at 8. The State also argued that the officers were permitted to enter the private property and search wherever they liked.

At the hearing on the motion to suppress, the trial judge first asked whether there were any factual disputes. RP 7. During argument on the motion he asked:

What was your client's expectation of privacy on the property where the jeep was located? Is it anything other than zero?

RP 17. Defense counsel tried to tell the judge that "ownership" of the property was not the correct inquiry. *Id.* The judge then said:

You have to cite a case to me that says that because that's not my understanding of the law, that a person has an expectation of privacy anywhere they park, their vehicle. If it's on property they don't own, how can that be an expectation of privacy?

Id. The judge stated that he was "at a loss to understand how an unlawful search occurred when one of these officers walked into the bushes of property that your client didn't own and found the Jeep parked back there." RP 19-20.

Again, he said:

I am saying he had no expectation of privacy on property he didn't own.

RP 23.

The trial judge assumed that Horton had no right to be on the property, although there had been no evidence to support that assumption. The Court then concluded: "I am going to make this easy for you. Okay? I am not finding that the officer's presence in the bushes where he found the jeep is an unconstitutional search." RP 25. He said:

I just do not believe that there any reasonable expectation of privacy when your client parked his Jeep in the bushes. He had no reason to expect that it wasn't going to be found, that someone might look at it.

Id.

The trial judge also appeared to find that the investigators were on the curtilage when they walked around the property running license plate numbers.

RP 27.

When defense counsel complained that the trial judge misstated the facts and said: "I do need to make a record." RP 30. The judge said: "No. You've made your record." *Id.* The judge then threatened to hold defense counsel in contempt if he continued to argue his motion. *Id.*

IV. ARGUMENT

A. THE TRIAL COURT'S CONCLUSION THAT HORTON, WHO WAS SLEEPING IN HIS RV AS A GUEST ON PRIVATE PROPERTY, HAD NO PRIVACY INTEREST IN HIS VEHICLES PARKED ON THAT PROPERTY OUT OF PLAIN VIEW, WAS ERROR

Horton parked his Jeep and RV on private property as a guest of the property owner. The trial judge concluded that only the owner of a particular piece of property has a reasonable expectation of privacy while on the property. The trial judge got the law wrong under both the Fourth Amendment and Const., Art. 1 § 7.

1. *Const. Art. I, § 7*

This Court must first analyze the alleged violation of the Washington Constitution and consider the federal constitutional claims thereafter. *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996). Const., Art. I § 7 prohibits government intrusion into private affairs. It states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is well settled that this provision provides greater protection to individual privacy rights than the federal Fourth Amendment. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.2d 202 (2004). Once this Court has determined that a particular provision of the state constitution has an independent meaning using the factors outlined in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), *reconsideration denied* (Aug 15, 1986), it need not reconsider whether to apply a state constitutional analysis in a new context. *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46, 48 (2002); *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Private affairs are those ““interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.”” *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (plurality opinion) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In determining whether a certain interest is a private affair deserving Const., Art. I § 7 protections, a central consideration is the nature of the information

sought – that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person’s life. *See State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); *McKinney*, 148 Wn.2d at 29; *State v. Young*, 123 Wn.2d 173, 183-84, 867 P.2d 593 (1994); *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990).

Preexisting State law indicates that Horton had a recognizable privacy right as a guest on private property. Even part-time or temporary residence may be a “private affair” that is protected. *State v. Jordan*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007) (names in motel registry are “private affairs”). By focusing solely on who owned the property, the trial judge failed to apply the correct state constitutional analysis.

2. *Fourth Amendment*

The expectation of privacy is a Fourth Amendment concern. *Myrick*, 102 Wn.2d at 510. The United States Supreme Court has recognized the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. *Rakas v. Illinois*, 439 U.S. 128, 142, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978), *reh’g denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1979). The U.S. Supreme Court has clearly held that an overnight guest has a legitimate expectation of privacy in the host’s home. *Minnesota v. Carter*, 525 U.S. 83, 89, 119 S.Ct. 469, 142 L.Ed.2d 373

(1998) (citing *Minnesota v. Olson*, 495 U.S. 91, 98-99, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)). Thus, in *Olson*, the Supreme Court held that, as an overnight guest, the petitioner had established an expectation of privacy “that society is prepared to recognize as ‘reasonable ...’” *Olson*, 495 U.S. at 95-96. The lack of any right to exclude others or a key to the apartment did not determine the reasonableness of petitioner’s expectation of privacy. Staying as an overnight guest in another’s home involves “a longstanding social custom that serves functions recognized as valuable by society.” *Olson*, 495 U.S. at 98.

Here, there is no dispute that Horton was an overnight guest on private property.

And it does not matter that the private property was a campsite. The Ninth Circuit has held that a defendant living in tent on public land has a reasonable expectation of privacy in the tent. Even though it was “unclear” whether the defendant had permission to camp on the BLM land, the court held the reasonableness of the defendant’s expectation of privacy did not turn on that issue. *United States v. Sandoval*, 200 F.3d 659, 660-661 (2000).

Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights.

Id. at 661. In distinguishing an earlier decision denying Fourth Amendment rights to a squatter in a private residence, *Sandoval* pointed out that:

camping on public land, even without permission, is far different from squatting in a private residence. A private residence is easily identifiable and clearly off-limits, whereas public land is often unmarked and may appear to be open to camping. Thus, we think it much more likely that society would recognize an expectation of privacy for the camper on public land than for the squatter in a private residence.

Sandoval at 661.

Here, Horton and many others were guests on private property. While they weren't staying in the owner's home, they brought their own living units and camped there. Thus, under the reasoning of *Olson* and *Sandoval*, Horton had a legitimate expectation of privacy in the mobile home in which he was residing that weekend and the land on which his temporary residence sat. *State v. Jones*, 101 Wn. App. 1036 (2000) (Jones had a legitimate expectation of privacy in a mobile home in which he resided and the five-acre parcel on which it was situated, even though both were owned by another person). He was an invited guest of the property owner. He was neither a squatter nor a trespasser. Thus, even under the Fourth Amendment the trial court erred in concluding Horton had no right to object to the search of the private property.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE OFFICERS DID NOT CONDUCT A SEARCH, BUT WERE SIMPLY WITHIN THE "CURTILAGE" OF THE "AREAS WHERE THESE RV'S WERE PARKED"

The State insists that no search took place. A search is a governmental intrusion into a person's reasonable and justifiable expectation of privacy or

private affairs. 12 Wash. Prac., Criminal Practice & Procedure § 2502 (3d ed.). It is true that the presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44, 47 (1981). Police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy. *Id.* at 902-03. Under the “open view” doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization of one or more of his senses does not constitute a search within the meaning of the Fourth Amendment when he is on the curtilage of private property. *State v. Ross*, 141 Wn.2d 304, 313, 4 P.3d 130 (2000).

An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house.

Ross, 141 Wn.2d at 312 (citing *Seagull*, 95 Wn.2d at 902).

However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

Seagull, 95 Wn.2d at 903. See also, *State v. Dyreson*, 104 Wn. App. 703, 710, 17 P.3d 668 (2001).

It is unclear what facts the trial court weighed in making his conclusion regarding the “curtilage” issue in this case because he did not enter any written finding of fact or conclusions of law. See CrR 3.6. But, in fact, there were two searches that must be evaluated under this argument.

1. *Search of the Bushes*

Assuming for the purpose of this argument, that the police could enter the property on the most open and direct route to approach at least one of the RV’s on the site, the State failed to establish that search by the Park Ranger who ventured deep into the property to search for the Jeep, was within his lawful authority.

In determining whether an officer exceeded the scope of an “open view”, one must consider several factors, including whether the officer (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally.

State v. Graffius, 74 Wn. App. 23, 27, 871 P.2d 1115 (1994) (citing *Seagull*, 95 Wn.2d at 905).

Considering these factors, the circumstances of the Park Ranger’s intrusion here exceeded the scope of any implied invitation. The discovery of the Jeep was not accidental; rather, after receiving responses he found

unsatisfactory by the people on the property, the Park Ranger ventured deep into the property specifically looking for the Jeep. He acted secretly in the sense that he did not ask anyone's permission to proceed further onto the property. It was nighttime and he used his flashlight to aid his observations. He found the Jeep 25 yards from the nearest road, 88 feet back from the nearest building on the property, behind a six foot fence and under some bushes. *See, e.g., State v. Dyreson*, supra (“Open view” exception to search warrant requirement did not apply to police officer’s warrantless entry into and search of defendants’ open garage).

This case is very similar to *State v. Hoke*, 72 Wn. App. 869, 875, 866 P.2d 670, 674 (1994). There, evidence demonstrated that the investigating officer exceeded his lawful authority when, after receiving no answer to his knock at the front door, he proceeded to the backyard. But (1) access along the west side of Hoke’s house was partially obstructed by stacked wood, a broken-down vehicle, a wheelbarrow, and miscellaneous tools, indicating that the area was not an access route; (2) the west-side yard was covered with grass, further indicating that it was not an access route; (3) no defined pathway encircled the house in either direction, implying the absence of any access route from front to back; (4) thick foliage, which bordered the west-side yard prevented access onto the property from the west, signaling a subjective expectation of privacy in that

area; and (5) the detective was forced to deviate from the direct access route, which ended at the front porch in order to reach the west-side yard.

Here, the Park Ranger ventured far outside the area where the occupants were around a campfire and far beyond where the RV's were parked. There was no defined pathway. Bushes prevented him from immediately seeing the Jeep. He deviated from any area off the most direct route to the areas where Horton and the others were camping.

This Court should find that the bushes where the Jeep was found were not an area of the curtilage impliedly open to the public. Therefore, the Park Ranger exceeded the scope of his implied invitation onto the property. The bulk of the evidence in the case was dependent on the Park Rangers' observations gained during this unlawful search. Thus, all of the evidence seized pursuant to that search, i.e., the Jeep, the license plate number, Horton's name and the officer's observations of him after locating him in his RV should have been suppressed.

2. *Search of the License Plates on the Remaining Vehicles on the Property*

Again, assuming for a moment that the police could enter the property on the most open and direct route to approach at least one of the RV's on the site, it is unclear how they had the authority to use their flashlights to continue the search and record the license plate of every other vehicle on the property,

including the license plate on Horton's RV. This activity was based upon the unlawful search for and seizure of the Jeep. Moreover, it can hardly be argued that the police were acting "in the same manner as a reasonably respectful citizen" might act on "the curtilage areas of a private residence." By parking off the road, outside of public view, Horton's RV license plate was not in "open view."

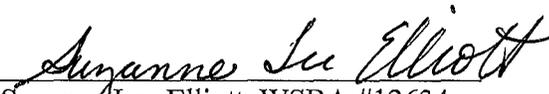
In the trial court, the State cited to *State v. McKinney*, supra. That case does say that drivers do not have a privacy interest in their licensing information stored at the Department of Licensing (DOL). But a careful reading of the case demonstrates that in the first joined case, the officers observed the vehicle license plate numbers while the vehicle was parked in the parking lot of a market. In the second joined case, they received the license plate number from a concerned neighbor. In the third joined case, the police were patrolling the parking lot of a motel and randomly checking vehicle license plates for stolen vehicles. None of these cases involved a search for a Jeep concealed in the bushes on private property after dark using flashlights. It was only after this warrantless search on private property that the State located the Jeep and its license plate.

V.
CONCLUSION

For the reasons stated above, this Court should reverse the trial court's order denying Horton's motion to suppress.

DATED this 1st day of February, 2016.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Appellant's Opening Brief

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