

FILED

MAR 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

28372-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN J. MILLER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

---

APPELLANT'S REPLY BRIEF

---

Janet G. Gemberling  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

## INDEX

A.	ARGUMENT.....	1
B.	CONCLUSION.....	2

## TABLE OF AUTHORITIES

### WASHINGTON CASES

STATE V. BELLOWS, 72 Wn.2d 264, 432 P.2d 654 (1967).....	2
STATE V. MORSE, 156 Wn.2d 1, 123 P.3d 832 (2005).....	2
STATE V. WILLIAMS, 148 Wn. App. 678, 201 P.3d 371 (2009).....	1

## A. ARGUMENT

The facts do not support the State's assertion that Ella Miller was a cohabitant with authority to consent to a search of the shed. There is no evidence she had the necessary control over the premises:

Under Article I, Section 7 of our constitution, the necessity of a present cohabitant's consent to a search is determined under the "common authority" rule. *Morse*, 156 Wn.2d at 7, 123 P.3d 832. Washington case law bases this rule on theories of "reasonable expectations of privacy" by the searched individual and "assumption of risk" of a search. *Id.* at 7, 8, 123 P.3d 832. To qualify as a cohabitant for purposes of common authority, a person must possess equal control over the premises. *Id.* at 18, 123 P.3d 832 (Fairhurst, J., concurring) (citing *State v. Thompson*, 151 Wn.2d 793, 805, 92 P.3d 228 (2004)).

*State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009). Ms. Miller did not have keys to the shed, while Donald Miller, Jr. did. The two did not possess equal control over the premises; Mr. Miller exercised control, excluded Ms. Miller from the premises, and apparently Ms. Miller had acquiesced in this arrangement for many years. Mr. Miller had a reasonable expectation of privacy respecting the contents of the shed vis a vis Ms. Miller; Ms. Miller lacked any authority to enter the shed or, thus, to authorize anyone else to do so. Certainly, since Mr. Miller had never given Ms. Miller the keys he had never assumed the risk that she would enter the shed, or authorize anyone else to enter the shed.

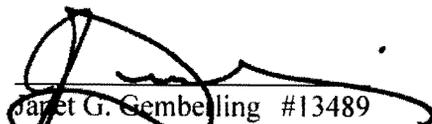
Moreover, even if Ms. Miller had equal control, her consent was insufficient since Mr. Miller was also present and did not consent. “Where two persons have equal right to the use or occupancy of the premises, either one can authorize search.” *State v. Bellows*, 72 Wn.2d 264, 268, 432 P.2d 654 (1967). But where both persons are present, the Washington Supreme Court has “never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises.” *State v. Morse*, 156 Wn.2d 1, 13, 123 P.3d 832 (2005).

#### B. CONCLUSION

The trial court erred in concluding that Ms. Miller had authority to consent to the search of the shed, and the conviction should be reversed.

Dated this 21st day of March, 2011.

GEMBERLING & DOORIS, P.S.

  
Janet G. Gemberling #13489  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 28372-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
RYAN J. MILLER,	)	
	)	
Appellant.	)	

---

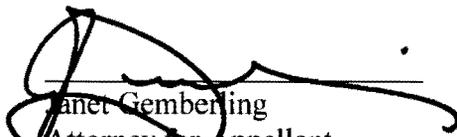
I certify under penalty of perjury under the laws of the State of Washington that on March 21, 2011, I mailed copies of Appellant's Brief in this matter to:

Kevin Eilmes  
Attorney at Law  
211 County Courthouse  
Yakima, WA 98901

and

Ryan J. Miller  
404 W. 4th #2  
Toppenish, WA 98948

Signed at Spokane, Washington on March 21, 2011.

  
Janet Gemberling  
Attorney for Appellant