

FILED

APR 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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 BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
2920 S. Grand Blvd., #132
Spokane, WA 99203
(509) 838-8585

FILED

APR 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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 BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
2920 S. Grand Blvd., #132
Spokane, WA 99203
(509) 838-8585

INDEX

A. ASSIGNMENT OF ERROR 1

B. ISSUES 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT.....7

 1. UNDISPUTED EVIDENCE SHOWS THE
 WARRANTLESS SEARCH OF THE
 INTERIOR OF THE SHED
 VIOLATED THE DEFENDANT’S
 CONSTITUTIONALLY PROTECTED
 EXPECTATION OF PRIVACY7

 2. A PERSON ACCUSED OF POSSESSION
 OF A CONTROLLED SUBSTANCE HAS
 STANDING TO CHALLENGE THE
 ADMISSIBILITY OF EVIDENCE ALLEGED
 TO HAVE BEEN FOUND IN HIS POSSESSION 10

E. CONCLUSION.....12

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BRADLEY, 105 Wn. App. 30,
18 P.3d 602, 27 P.3d 613 (2001)8

STATE V. FIELDS, 85 Wn.2d 126,
530 P.2d 284 (1975)7

STATE V. JONES, 146 Wn.2d 328,
45 P.3d 1062 (2002)10, 11

STATE V. LEACH, 113 Wn.2d 735,
782 P.2d 1035 (1989)9

STATE V. MORSE, 156 Wn.2d 1,
123 P.3d 832 (2005)7, 8, 9

STATE V. REICHENBACH, 153 Wn.2d 126,
101 P.3d 80 (2004)7

SUPREME COURT CASES

ILLINOIS V. RODRIGUEZ, 497 U.S. 177,
110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).....8

UNITED STATES V. MATLOCK, 415 U.S. 164,
94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).....8

CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT7, 8

WASH. CONST. ARTICLE I, § 77, 8

STATUTES

RCW 69.50.401310

A. ASSIGNMENT OF ERROR

1. The court erred in denying the motion to suppress evidence found in the shed.

B. ISSUES

1. Does a person accused of possession of a controlled substance have standing to challenge the admissibility of evidence alleged to have been found in his possession?
2. Does undisputed evidence show the warrantless search of the interior of the shed violated the defendant's constitutionally protected expectation of privacy?

C. STATEMENT OF THE CASE

Deputy Robert Tucker went to property owned by Ella Miller on North Becker Road. (RP 20) He was responding to a domestic violence call, in which Ryan Miller was a person of interest. (RP 20-22) When he arrived at the property he saw three people by a camper. (RP 21) One of them identified himself as Ryan. (RP 21) Deputy Tucker detained Ryan¹ and placed him in his patrol car. (RP 21-22)

¹ With the exception of law enforcement officers, most of the witnesses in this matter have the last name Miller. In order to avoid confusion, all will be identified and referred to by their first names.

At that point, Deputy Tucker saw Deputy McIlrath, who had arrived separately, approaching. (RP 22) After asking Deputy McIlrath to watch the other individuals, Deputy Tucker went to speak with Ella. (RP 22) She invited him inside her home and told him that her grandson was growing marijuana on her property and she didn't want him there. (RP 22, 41)

Deputy Tucker asked Ella for consent to search her property and she told him that would be fine. (RP 22) She told him she owned all of the property with the exception of her son Donald, Jr.'s manufactured home. (RP 23)

Deputy Tucker saw what appeared to be marijuana plants behind what appeared to be chicken coops behind Ella's house. (RP 24) He went to a shed where he smelled what he believed was marijuana, and inside the shed he saw fragments of green leaves. (RP 26) He also saw wires, and a water bong. (RP 25) Deputy Tucker went inside the shed, and determined there was a substantial quantity of what appeared to be marijuana leaves scattered around an old truck. (RP 26)

Deputy Tucker continued to the nearby camper where he had first seen Ryan and two others vacuuming, and saw an apparent marijuana leaf outside the door. (RP 26, 112) After verifying with Ella that she owned

the camper, Deputy Miller went inside and found two firearms and additional green leaves scattered on the floor. (RP 27-28)

The deputy observed a trail leading from Ella's property to an adjacent corn field. (RP 31) He followed the trail and found seven bags of marijuana in the field. (RP 31)

After securing the firearms and other larger items, Deputy Tucker obtained a search warrant. (RP 30, 32)

The State charged Ryan with manufacturing and possession of marijuana. (CP 50) The defense filed a motion to suppress evidence found in the warrantless search. (CP 66)

At the suppression hearing Ella told the court that her son Donald, Jr. had lived on her property for about ten years in a modular home he had put there. (RP 47-48) Donald, Jr. was Ryan's father, and also the father of Donald III. (RP 47-48) Various members of Donald, Jr.'s family had lived in his residence during that time. (RP 48)

Ella told the court that Donald, Jr. had built the shed after he moved to her property, and he had the keys to it. (RP 49-50) He used the shed, but Ella had never used the shed. (RP 49) He had told her he always kept the shed locked. (RP 51) She also testified that she had sold the camper to Donald, Jr. about fifteen years earlier. (RP 50) She denied

having given Deputy Tucker oral consent to search her property. (RP 56, 60)

Donald, Jr. agreed that he had put his residence on the property when he moved there in 2000. (RP 85) He also built the shed, or “shop,” which he used to store tools and equipment. (RP 86) He kept it padlocked, and had given the only key to Ryan about two weeks before he was arrested. (RP 100) According to Donald, Jr., Ella sold him the camper several years before he moved to her property. (RP 87)

For some time prior to 2008, Donald, Jr.’s brother, Kevin, Sr., and his son Kevin, Jr. had been living with Ella. (RP 88) But Ella had kicked them out, and Donald, Jr. gave Kevin, Sr. permission to stay in the camper. (RP 88-89, 143) On the day Deputy Tucker arrived in response to the domestic violence call, Kevin, Sr. had been in the process of cleaning out the camper. (RP 89) Donald, Jr. recalled that after Ryan had been arrested, Ella approached one of the deputies and began talking to him. (RP 96) She then got into an argument with Donald, Jr.’s wife Angela, and the deputy told her to go back to her house. (RP 96) Then he saw one of the deputies go inside the “shop.” (RP 96)

Ryan’s sister Angela told the court that just after the deputies arrested Ryan she was with her parents, her brothers and Ryan’s girlfriend, when Ella approached and told the deputies the evidence was in the shed,

told them it was her property, and said that they could search. (RP 134)

After that she saw them enter the shed and camper. (RP 137)

Deputy Tucker explained to the court that he had obtained Ella's consent to the search immediately after arresting Ryan, while she was standing at the door to the carport, and later went back to her door to verify that she owned the camper. (RP 162)

Finding that Ella had both real and apparent authority to authorize the search of the property, including the shed and camper, the court denied the motion to suppress the evidence found in the search. (CP 3-4)

Evidence introduced at trial included photographs of marijuana pieces on the floor, marijuana debris, marijuana in a blue box, marijuana pipes and light fixtures. (Exh. 6, 8-9, 11, 38, 55, 58, 68) These objects were identified as coming from the shed or camper. (RP 426, 500, 504-05, 520, 548-50, 697-703)

Ella told the jury that the night before she called the police she had seen Ryan, Angela, and Ryan's girlfriend using scissors to trim leaves off of green stems that looked like marijuana. (RP 254-55) The next day she confronted Ryan while he was in the shed, and saw plants hanging from a clothesline inside. (RP 259) She testified that after a brief struggle she knocked the plants to the floor. (RP 261) According to Ella, Ryan's girlfriend and his mother brought out black leaf bags, and Ryan picked up

the plants and put them in the bags. (RP 262) She testified that she had seen marijuana growing in the shed. (RP 411) She confirmed that she had never used the shed. (RP 410)

Deputy Tucker described arriving at the Miller property and detaining Ryan. (RP 493) He told the jury that he saw what he recognized as marijuana plants in and near the shed. (RP 498) As he was coming out of the shed he also saw a water bong, which is used to smoke marijuana. (RP 499) He went to another door to the shed, where he went inside and found additional “marijuana shake” on the benches and floor. (RP 503-04) He also saw wires that, he explained to the jury, are commonly used to dry marijuana plants as part of the manufacturing process. (RP 506-07) He also described entering the camper and finding a vacuum cleaner with marijuana inside. (RP 512)

The deputy then told the jury he had followed a trail to an adjacent cornfield where he found numerous plastic bags containing marijuana. (RP 513-17) He placed all of the marijuana he had found in the trunk of a patrol car and took it to the sheriff’s department where it was laid out to dry. (RP 521-25)

An evidence specialist described for the jury how she collected random samples from the dried marijuana, tested them and determined that they all contained marijuana. (RP 621-32)

The jury found Ryan guilty of both charges and he appealed the judgment and sentence. (CP 5, 13-19, 22-23)

D. ARGUMENT

1. UNDISPUTED EVIDENCE SHOWS THE WARRANTLESS SEARCH OF THE INTERIOR OF THE SHED VIOLATED THE DEFENDANT'S CONSTITUTIONALLY PROTECTED EXPECTATION OF PRIVACY.

Both the Fourth Amendment to the United States Constitution and article I, § 7 of the Washington Constitution protect against unreasonable searches and seizures. *State v. Fields*, 85 Wn.2d 126, 130, 530 P.2d 284 (1975). Although both of these provisions protect individual privacy interests, “article I, section 7 provides greater protection of individual privacy than the Fourth Amendment.” *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005).

“Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable.” *State v. Morse*, 156 Wn. 2d at 7. While there are exceptions to the warrant requirement, these exceptions are “jealously and carefully drawn.” *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004)) When challenged, the State must prove that the warrantless search is justified

under an exception to the warrant requirement. *State v. Bradley*, 105 Wn. App. 30, 36, 18 P.3d 602, 27 P.3d 613 (2001).

The trial court relied, at least in part, on the doctrine of apparent authority, to find that Ella was able to give valid consent to the search of the shed. Under the Fourth Amendment, the valid consent of a third party who has actual authority over, or a sufficient relationship to, the property to be inspected is a recognized exception to the warrant requirement. *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). A person who has apparent authority may give valid consent to search if the appearance of authority rests on facts that, under the circumstances, the officer reasonably believes to be true. *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) “[W]hile under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, § 7 the focus is on expectations of the people being searched and the scope of the consenting party’s authority.” *State v. Morse*, 156 Wn.2d at 10. A person who does not have free access to the area to be searched cannot give valid consent to a search:

The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that

the consenting co-occupant would invite others into the shared area.

State v. Morse, 156 Wn.2d at 10-11. Moreover, where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, “that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent.” *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989).

Donald, Jr. testified, and Ella acknowledged, that she had never had free access to the shed because Donald, Jr. had padlocked the entrance and retained the key. At the time of the search, Ryan had possessed the key, with Donald, Jr.’s consent, and had been using the shed for two weeks. Under these circumstances no one could conclude that Ryan had assumed the risk that Ella would invite others into the shed. And even had he done so, since he was not absent at the time of the search, Ella’s consent was not valid.

Nor does Washington recognize a good faith exception to the warrant requirement. *Morse*, 156 Wn.2d at 12. *Id.* In *Morse*, the court held that an officer’s subjective, good-faith belief about the scope of an occupant’s authority to consent to the search of the residence—standing alone—“cannot be used to validate a warrantless search under article I,

section 7.” Ella’s mere assertion that she owned the property was utterly insufficient to validate the warrantless search.

Admitting the evidence obtained as the result of the warrantless search of the shed violated Ryan’s constitutionally protected privacy rights. The convictions should be reversed.

2. A PERSON ACCUSED OF POSSESSION OF A CONTROLLED SUBSTANCE HAS STANDING TO CHALLENGE THE ADMISSIBILITY OF EVIDENCE ALLEGED TO HAVE BEEN FOUND IN HIS POSSESSION.

“To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure.” *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). There must be a direct relationship “between the challenged police action and the evidence used against the defendant.” *Jones*, 146 Wn.2d at 334.

Ryan was charged with, and convicted of, possession of a controlled substance, an essential element of which is possession. *See* RCW 69.50.4013. The undisputed evidence showed that Deputy Tucker entered the shed, observed its contents in detail, and seized certain items as evidence, based solely on Ella’s consent to the search. Deputy Tucker testified about his observations when he first entered the shed, and the

items he found inside, or photographs thereof, were introduced into evidence at Ryan's trial. This evidence provided the primary corroboration of Ella's accusations.

To satisfy the second requirement, "possession may be actual or constructive to support a criminal charge." *Jones*, 146 Wn.2d at 333. "A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item." *Jones*, 146 Wn.2d at 333.

Although Ella claimed to own all of the property, it was undisputed that her son Donald, Jr. had built the shed, that he had used it for many years, that he had exerted exclusive control by keeping it padlocked, and that Ella had never used the shed. It was also undisputed that Donald, Jr. had the only key to the shed, that he had entrusted the key to his son Ryan two weeks earlier and thus, at the time of the search, Ryan had dominion and control of the shed.

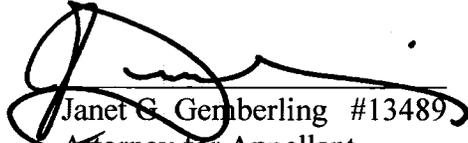
The testimony establishes Ryan's standing to challenge the admissibility of the evidence found in the shed.

E. CONCLUSION

The trial court's denial of the defense motion to suppress evidence found in, or derived from, the deputy's search of the shed requires reversal of Ryan's conviction.

Dated this 6th day of April, 2010.

GEMBERLING & DOORIS, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

FILED

APR 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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.)	

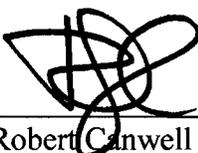
I certify under penalty of perjury under the laws of the State of Washington that on this day I served a copy of this document by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on April 6, 2010, I mailed a copy of Appellant's Brief in this matter to:

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

Signed at Spokane, Washington on April 6, 2010.



Robert Canwell
Legal Assistant