





TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
Table of Cases.....	ii
I. STATEMENT OF FACTS.....	1
II. ISSUES.....	5
2.1 Was Detective Helvey’s observation of the firearm in the travel trailer permissible under the “open view doctrine”?	
III. ARGUMENT.....	6
3.1 Detective Helvey’s initial entry onto the defendant’s property and viewing of the firearm in the travel trailer did not constitute a search under the “open view” doctrine.	
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

Table of Cases

	<u>Page</u>
<u>State v. Butterworth</u> , 48 Wn. App. 152, 737 P. 2d 1297 (1987).....	7
<u>State v. Bobic</u> , 140 Wash.2d 250, 259, 996 P.2d 610 (2000).....	7
<u>State v. Chaussee</u> , 72 Wash. App. 704, 710, 866 P.2d 643, Review denied. 124 Wash.2d 1008, 879 P.2d 292 (1994).....	9
<u>State v. Hornback</u> , 73 Wash. App. 738, 743, 871 P.2d 1075 (1994).....	9,10
<u>State v. Jesson</u> , 142 Wn. App 852, 177 P. 3d 139 (2008).....	9,10,11
<u>State v. Lemus</u> , 103 Wn. App. 94, 102, 11 P.3d 326 (2000).....	8
<u>State v. Ludvik</u> , 40 Wn. App. 257, 698 P. 2d 1064 (1985).....	7
<u>State v. Myers</u> , 117 Wn. 2d 332, 345, 815 P.2d 761 (1991).....	8
<u>State v. Ridgeway</u> , 57 Wn. App 915, 790 P. 2d 1263 (1990).....	9,10,11
<u>State v. Rose</u> , 128 Wash.2d 388, 392, 909 P.2d 280 (1996).....	7
<u>State v. Ross</u> , 141 Wn. 2d 304, 312, 4 P.3d 1340 (2000).....	7,9,10

<u>Sate v. Seagull</u> , 95 Wn. 2d 898, 632 P. 2d 44 (1981).....	7,8,14,15
<u>State v. Vonhof</u> , 51 Wn. App. 33, 39, 751 P.2d 1221 (1991).....	8
<u>United States v. Vihotti</u> , 323 F. Supp. 425 (S.D.N.Y.), aff'd in part and rev'd in part, 452 F. 2d 1186 (2d Cir. 1971), cert. denied, 406 U.S. 947, 92 S. Ct. 2051, 32 L.Ed.2d 335 (1972).....	8

Other References

The Washington State Constitution Art. I, Section 7.....	6
U.S. Const., Amend. IV.....	6

## I. STATEMENT OF FACTS

On October 26, 2009 Riley Jay Kalk was charged by information with three (3) counts of unlawful possession of a firearm in the first degree. (CP 3-5). The charges stemmed from a search of his property by the Douglas County Sheriff's Office and the discovery of multiple firearms. Mr. Kalk challenged the search of his property at a suppression hearing held on March 8, 2010 in Douglas County Superior Court. The facts relevant to this appeal arise out of testimony presented at that hearing.

### *3/8/10 Suppression Hearing*

#### *Testimony of Detective Dave Helvey*

On October 19, 2009 Detective Helvey was contacted by CPS caseworker Kathie Pete concerning the welfare of Spencer Walls. (RP 19-20). The initial referral to CPS was received from the Mansfield School District. (RP 20). The referral noted that Spencer Walls was out of prescription medication, Mr. Walls' mother was out of contact, Mr. Walls resided on property that had no electricity or water, Mr. Walls had to walk three (3) miles to catch the school bus, Mr. Walls arrived at school dirty, and unbathed, and that the school had been washing his clothes and allowing him to bathe at their facility. (RP 31-32). The referral

also indicated that Mr. Walls resided on property off of Columbia River Bluffs Road. (RP 20). Along with the referral from the Mansfield School was a hand drawn map detailing how to get to Riley Kalk's property. (RP 83-84). The map was drawn by Donald Erickson, who is a bus driver for the Mansfield School. (RP 83-84). On October 20, 2009, in an attempt to locate Spencer Walls, Detective Helvey and Kathy Pete traveled to the property listed in the referral which was situated in a remote area of Douglas County northwest of McNeil Canyon. (RP 20-21, 41). Detective Helvey described in detail the route taken to Mr. Kalk's property. (RP 23-25). Detective Helvey testified that McNeil Canyon Road and Columbia Bluffs Road are county roads. (RP 25). The only private road traveled by Detective Helvey and Kathy Pete was the road leading from Columbia Bluffs Road to Mr. Kalk's property. (RP 23-25). Although the private road was equipped with a gate, the gate was open on October 20<sup>th</sup>, 2009. (RP 25). Detective Helvey did not observe any "no trespass" signs, or other signage, on the gate or nearby which restricted travel onto the private road. The gate itself sits on property not owned by Mr. Kalk. (RP 30). That specific property is owned by Donald Erickson, the school bus driver for the Mansfield School.

(RP 83-84). Mr. Erickson is the same person that provided the detailed map to the defendant's property. The private road leading to Mr. Kalk's property is approximately one (1) mile long. (RP 33). Mr. Kalk does not own the private road, nor does he own any of the property bordering the road as it travels to his property. (RP21-23, CP 1). As Detective Helvey and Ms. Pete traveled on the private road they observed no fencing, gates or signage restricting travel on the road. (RP 33). Upon arriving at Mr. Kalk's property there were no fencing around it, no gates restricting access to it, nor any signs advising visitors were not welcome. (RP 33). No one was present when Detective Helvey and Ms. Pete arrived. (RP 33). Detective Helvey walked to the door of the motor home and travel trailer and knocked on them, and received no answer. (RP 34). The property was essentially dirt, and had no established walkway to and from the motor home and travel trailer. (RP 35-36). Detective Helvey observed numerous dogs and cats in poor condition. (RP 34). In the travel trailer Detective Helvey observed through a window a 12-gauge shotgun. (RP 34-35). Detective Helvey and Ms. Pete were at the property for approximately 15 minutes and left traveling the same route that they arrived on. (RP 37). Detective Helvey and

Ms. Pete then traveled to the Mansfield School and contacted Spencer Walls. (RP 47). Mr. Walls was subsequently placed in the custody of CPS by an emergency placement order on October 22, 2009. (RP 49).

A subsequent criminal history search for Riley Kalk revealed that he had been previously convicted of a felony which made it unlawful for him to have possession of a firearm. (RP 37). Detective Helvey subsequently applied for a search warrant to recover the firearm he observed. (RP 37). The search warrant was executed on the property on October 21, 2009. (RP 37). Riley Kalk was present on the property when the search warrant was executed. (RP 39). 17 firearms were recovered from the property. (RP 38). The Humane Society responded to the property as well and took possession of the dogs and cats found on the property due to their poor condition. (RP 38). Riley Kalk was arrested for unlawful possession of a firearm. (RP 41).

*Testimony of Riley Kalk*

Mr. Kalk testified that he is the owner of the real property searched by the Douglas County Sheriff's Office, and of the motor home and travel trailer situated thereon. (RP 62-63). On October 20, 2009 Mr. Kalk drove from his property to the

Safeway store, opening and closing the gate behind him. (RP 74). The gate has been left open on other occasions. (RP 74). Mr. Kalk acknowledged that there are no signs posted along the private road after passing the gate. (RP 75). Mr. Kalk acknowledged that the property where the gate is located is not owned by him. (RP 76). He acknowledged that he did not fence his property, did not put a gate restricting access, nor did he post any signs on his property. (RP 78-79). He acknowledged that he took no specific action to put the public on notice that they were not welcome to come to his property. (RP 81).

The trial court entered written findings of fact, conclusions of law and order on 3.6 hearing denying Mr. Kalk's motion to suppress the firearms. (CP 70-74). Mr. Kalk subsequently submitted the case to the trial court on stipulated facts. (CP17-18, 19-21). The trial court found Mr. Kalk guilty of one count of unlawful possession of a firearm in the first degree on April 12, 2009. (CP 67-69).

## II. ISSUES

2.1 Was Detective Helvey's observation of the firearm in the travel trailer permissible under the "open view doctrine"?

### III. ARGUMENT

3.1 Detective Helvey's initial entry onto defendant's property and viewing of the firearm in the travel trailer did not constitute a search under the "open view" doctrine.

The principle issue raised in this appeal is whether the initial entry onto the defendant's property by Detective Helvey and child protection caseworker Kathy Pete was an impermissible search of his property.

The guidelines for restricting intrusions into the personal affairs of persons is set forth in both the U.S. Const., Amend. IV; and State Constitution Art. I, Section 7:

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State Constitution, Art. I, Section 7, states:

No person shall be disturbed in his private affairs, or his home invaded without authority of law.

Const. Art. 1, Section 7. prohibits unreasonable intrusions into those privacy interests which citizens of this state have held,

and should be entitled to hold, free from governmental trespass without valid legal process. State v. Butterworth, 48 Wn. App. 152, 737 P. 2d 1297 (1987). Only searches involving an element of state action are subject to the requirements of the Fourth Amendment and Const. Art. 1, Section 7. State v. Ludvik, 40 Wn. App. 257, 698 P. 2d 1064 (1985).

Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment. State v. Ross, 141 Wn. 2d 304, 312, 4 P.3d 1340 (2000) citing State v. Seagull, 95 Wn. 2d 898, 632 P. 2d 44 (1981). “Under the open view doctrine, when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a search.” State v. Bobic, 140 Wash.2d 250, 259, 996 P.2d 610 (2000) (internal quotation marks omitted) (quoting State v. Rose, 128 Wash.2d 388, 392, 909 P.2d 280 (1996)). Accordingly, “[t]he ‘open view’ observation is ... not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a

search pursuant to a warrant.” State v. Lemus, 103 Wn. App. 94, 102, 11 P.3d 326 (2000). “[C]ontraband observed in “open view” is subject to seizure pursuant to a search warrant or one of the exceptions thereto.” Id. at 104, 11 P.3d 326.

Three elements must be present for the open view doctrine to apply: the deputies must have (1) been in an impliedly open area; (2) on legitimate police business; and (3) detected the evidence by use of their senses from the impliedly open vantage point.

#### *Impliedly Open Area*

Police with legitimate business may enter areas of the curtilage that are impliedly open, such as access routes to a house. State v. Seagull, 95 Wn. 2d 898, 902, 632 P. 2d 44 (1981). In doing so, however, an officer must conduct themselves as would a “reasonably respectful citizen.” Seagull at 902 (citing United States v. Vihotti, 323 F. Supp. 425 (S.D.N.Y.), aff’d in part and rev’d in part, 452 F. 2d 1186 (2d Cir. 1971), cert. denied, 406 U.S. 947, 92 S. Ct. 2051, 32 L.Ed.2d 335 (1972)). An officer has the same right as a citizen to view ‘that which § is § there to be seen.’ State v. Myers, 117 Wn. 2d 332, 345, 815 P.2d 761 (1991) (quoting State v. Vonhof, 51 Wn. App. 33, 39, 751 P.2d 1221 (1988)). In State v.

Jesson, 142 Wn. App 852, 177 P. 3d 139 (2008) the court discussed factors which are material to the determination of whether property is impliedly open to the public:

Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry. *Id.* at 902-03, 632 P.2d 44. An access route is impliedly open to the public, absent a clear indication that the owner does not expect uninvited visitors. See Ross, 141 Wash.2d at 312, 4 P.3d 130; see also State v. Hornback, 73 Wash. App. 738, 743, 871 P.2d 1075 (1994). "No Trespassing" signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. See State v. Chaussee, 72 Wash. App. 704, 710, 866 P.2d 643, *review denied*, 124 Wash.2d 1008, 879 P.2d 292 (1994). Entry during daylight hours is more consistent with that of a reasonably respectful citizen. See Ross, 141 Wash. 2d at 314, 4 P.3d 130.

Jesson at 859-60.

The defendant argues that under the facts and circumstances of this case his property was not impliedly open to the public such that the initial visit by Detective Helvey and caseworker Kathy Pete on October 20, 2009 constituted an unlawful search.

The precise issue raised by defendant was addressed by the courts in State v. Ridgeway, 57 Wn. App 915, 790 P. 2d 1263 (1990); State v. Ross, 141 Wn. 2d 304, 4 P. 3d 130 (2000); State

v. Hornback, 73 Wn. App 738, 871 P. 2d 1075 (1994); and State v. Jesson, supra.

In Ridgeway the driveway leading up to the residence was blocked by a closed gate (not present in our case). Deputies in Ridgeway walked around the closed gate (not present in our case). Barking dogs were “positioned” at the door nearest the driveway (not present in our case). Deputies in Ridgeway circled to a far door to avoid the barking dogs (not present in our case). Although not clear from the facts in Ridgeway, it appears that the long driveway was owned by Ridgeway and used exclusively to access his residence (not present in our case). While it is accurate that defendant's property herein is very rural and not visible from the county road, that fact, in and of itself, does not mean the property is not impliedly open to the public. Other factors must exist which provide a clear indication that the owner does not expect uninvited visitors. State v. Ross, 141 Wn. 2d at 312, 4 P. 3d 130). The defendant herein provided no such indication. Defendant did not post his property with signs suggesting entry was uninvited, did not fence in his property, and did not construct a gate restricting entry. An average citizen

driving to the defendant's property would have no notice that he was "uninvited" to do so.

In Jesson, the deputy passed several signs marked "No Trespassing" and "Keep Out" to access the defendant's property (not present in this case as the posted sign on the gate was not owned or placed there by defendant). The deputy opened a closed gate to access Jesson's driveway (not present in our case). The gate at Jesson's property was posted with a "No Trespassing" sign (not present in our case). Just beyond Jesson's gate the property was posted with a "Keep Out" sign (not present in our case). The Jesson case is clearly distinguishable from our present case, and supports the proposition that if a person wishes to keep visitors off of his property he must provide notice that access to his property is restricted. In the instant case, as described above, the defendant herein took no measures whatsoever to provide notice that visitors were not welcome on his property.

The defendant attempts to bring his property under the umbrella of Ridgeway and Jesson although he actually took no efforts to restrict or put visitors on notice that they were not welcome on his property. Defendant can not rely on an open

gate on someone else's property which sits over a mile from his property, posted with an old faded sign by someone else, as notice that access to his property was not impliedly open to the public. He did not separately post his property, fence his property, or install a gate to restrict access. The private road used by Detective Helvey and case-worker Kathy Pete to access defendant's property is not owned by him, and is used by others to access their separate property.

*Legitimate Police Business*

The second issue under "open view" is whether Detective Helvey was on legitimate police business when he and caseworker Kathie Pete drove to and went on the defendant's property.

The respondent acknowledges that Detective Helvey did not have an arrest or search warrant when he went onto the property. However, it is clear from the record that Detective Helvey and caseworker Kathie Pete were conducting a child protective services investigation on minor child reported to be living on the defendant's property. Testimony at the suppression hearing established that on October 19, 2009 child protective services (CPS) received and forwarded onto the Douglas County

Sheriff's Officer a child welfare referral concerning Spencer Walls. The referral was initiated by the Mansfield School District and alleged that Spencer Walls was out of prescription medication, Mr. Walls' mother was out of contact, Mr. Walls resided on property that had no electricity or water, Mr. Walls had to walk three (3) miles to catch the school bus, Mr. Walls arrived at school dirty, and unbathed, and that the school had been washing his clothes and allowing him to bathe at their facility. On October 20, 2009 Detective Helvey and CPS caseworker Kathie Pete drove to the defendant's property in an attempt to locate Spencer Walls or a responsible adult. Under the circumstances in this case Detective Helvey was clearly conducting legitimate police business when he went onto the defendant's property.

At the suppression hearing Detective Helvey testified that his purpose in traveling to defendant's property was to locate Mr. Walls, and that the distance to Mr. Walls' reported address (defendant's property) was shorter than that to the Mansfield School. The defendant suggested that it would have made more sense for Detective Helvey to respond first to the Mansfield School to locate Spencer Walls, rather than go to the defendant's property. While this issue may be debatable between reasonable

minds, no evidence was presented at the evidentiary hearing that suggested or established that Detective Helvey or caseworker Pete had any ill motive in traveling first to the defendant's property, or that they were merely on a "lark" in doing so.

Detective Helvey was conducting legitimate police business when he traveled to and onto the property of the defendant.

*Detection by Senses from Impliedly Open Vantage Point*

The third issue under the "open view" doctrine is whether Detective Helvey's observation of the firearm was from an impliedly open vantage point.

In Seagull the court identified several factors in that case which were relevant in consideration on this issue. First, the court found that the officer took a normal route to access the house door; second the court found that the officer did not deviate substantially from that access route; third it found that the police did not "spy into a residence" (Seagull at 905); lastly the court found that the officer did not act secretively, and arrived during daylight hours, and "did not create an artificial vantage point from which to advance his observation. Seagull at 905. Although the court ultimately ruled that the "open view" doctrine

was inapplicable in Seagull, that decision was based upon the fact the an officer subsequently departed from the normal access route and climbed up a hill 20-25 feet behind the house and manipulated a license plate.

The defendant's property is located in rural Douglas County. The property consisted of a travel trailer and motor home parked in dirt, with no established walkway to and from the vehicles. No fencing was present to clearly establish any property or yard boundaries. Detective Helvey drove to the property during the daytime. Detective Helvey walked to the door of the motor home and travel trailer and knocked on each of them and received no response. While outside the travel trailer Detective Helvey observed a 12 gauge shotgun. The entire period of time Detective Helvey was on the property was approximately 15 minutes. After determining that no person was present in the motor home, travel trailer or on the property, Detective Helvey and caseworker Kathie Pete left in their vehicle and traveled to the Mansfield School.

Under the circumstances in this case it is clear that Detective Helvey observed the shotgun in the travel trailer from an impliedly open vantage point. There is no evidence that he

manipulated any property to observe the firearm, nor did he divert from the normal access route to the travel trailer and motor home. The visit by Detective Helvey was during daytime, and was not secretive in nature.

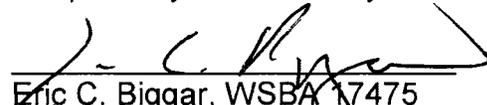
Respondent submits that Detective Helvey's visit to the defendant's property and observation of the 12 gauge shotgun falls directly under the "open view" doctrine. Accordingly, his observation did not constitute an impermissible search. The trial court did not error in denying defendant's motion to strike the firearm observation from the search warrant.

#### IV. CONCLUSION

The "open view" doctrine applies to Detective Helvey's observation of the 12 gauge shotgun in the defendant's travel trailer. The route traveled by Detective Helvey to the defendant's property was impliedly open to the public, as well as the access route taken when Detective Helvey walked onto defendant's property to the motor home and travel trailer. Detective Helvey was conducting legitimate police business at the time he entered onto defendant's property, and his observation of the firearm was an impliedly open vantage point. The trial court's order denying defendant's motion to suppress the firearms located on his property should be affirmed.

Dated: 12/1/10

Respectfully Submitted by:

  
Eric C. Biggar, WSBA 17475  
Deputy Prosecuting Attorney  
Attorney for Respondent