

No. 299562-III

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION III

FILED

JAN 17 2012

COURT OF APPEALS
STATE OF WASHINGTON
BELLINGHAM

STATE OF WASHINGTON

Respondent

v.

JORGE LUIS CAZARES SOSA

Appellant

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT

AMENDED BRIEF OF APPELLANT

CARNEY & MARCHI, P.S.
Nicholas W. Marchi
Attorney for Appellant

Address:
108 So. Washington Street, Suite 406
Seattle, WA 98104
Telephone: (206)224-0909

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I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it allowed the State to reopen its case in chief and present additional testimony.
2. The trial court erred when it denied the Appellant's Motion to Suppress Evidence.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court error when it allowed the State to reopen its case to present testimony after the trial court granted the Appellant's Motion to Suppress?
2. Did the trial court error when it denied the Appellant's Motion to Suppress Evidence?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

Mr. Sosa was charged with two counts of Unlawful Possession of a Firearm in the Second Degree. (CP 8). On May 9, 2011, the court found Mr. Sosa guilty by stipulated facts trial of both counts. (CP 30) The court sentenced Mr. Sosa to five months on each count to run consecutive. (CP 34) Notice of Appeal was timely filed. (CP 43)

In the course of proceedings, Mr. Sosa filed Motion to Suppress Evidence. (CP3) At the conclusion of the evidentiary hearing, the court granted the Motion to Suppress. (RP 45-46) After the ruling, the State moved to reopen the proceedings and the court granted the request. (CP 24-26) At the conclusion of the second hearing, the court denied the Motion to Suppress. (CP 3)

Mr. Sosa entered a stipulated facts trial and was found guilty of two counts of Unlawful Possession of a Firearm in the Second Degree. (CP 29). He was sentenced to five months on each count. (CP 30) He timely filed a Notice of Appeal. (CP 43)

The testimony at the Suppression Hearing was as follows:

John Ingersall

Officer Ingersall worked for the Mattawa Police Department. (RP 7, Feb. 9, 2011) On April 24, 2011, he was dispatched to a shots fired call in Mattawa. (RP 7, Feb. 9, 2011) The officer went to a residence where shots had been fired. At the residence, witnesses identified Mr. Sosa as being involved in the incident. (RP 9, Feb. 9, 2011)

The officers then went to Mr. Sosa's mother's address at 402 S. Ellice Avenue, in an attempt to locate him. (RP 11, Feb. 9, 2011) The officers then went to a trailer where Mr. Sosa allegedly lived at 200 East Fourth Street, Number 110. (RP 12, Feb. 9, 2011)

Upon arriving at the residence, the Officer observed Mr. Sosa outside the residence. (RP 13, Feb. 9, 2011) The Officer advised Mr. Sosa that there had been a shooting and that they were looking for several suspects. (RP 14, Feb. 9, 2011) The Officer then requested permission to come into the trailer and look for suspects. (RP 14, Feb. 9, 2011) Mr. Sosa gave permission and officers entered the residence. In the course of checking the residence Officer Chiprez located two shotguns in a closet. (RP 14, Feb. 9, 2011)

Officer Ingersall did not locate the weapons but was told they were found. (RP. 28, Feb. 9, 2011) The purpose of the search was to look for people. (RP 29, Feb. 9, 2011)

Anthony Valdivia

Officer Valdivia testified that he knew Mr. Sosa. (RP 32, Feb. 9, 2011) He knew that Mr. Sosa lived at 402 Ellice with his mother and that they had purchased the residence. (RP 32, Feb. 9, 2011) This was also the residence that Mr. Sosa was staying. (RP 32 Feb. 9, 2011)

The Officer was present at No. 110, when Mr. Sosa gave consent to the search. (RP 34, Feb. 9, 2011) The officer also knew the 110 residence was Mr. Sosa. (RP 34, Feb. 9, 2011) The officer also testified that Mrs. Sosa owned the residence. (TR 36, Feb. 9, 2011)

The officer did not run a property check on the residence to see who owned the property. (RP 36, Feb. 9, 2011) The officer did not run a title check on the property. (RP 36, Feb. 9, 2011) There was no indication we who lived at the No. 110, nor were there documents of dominion and control from Mr. Sosa located at the residence, No. 110. (RP 37, Feb. 9, 2011) The officer merely concluded that Mr. Sosa lived at No. 110.

The officer was present when the shotguns were located. He did not see Officer Chiprez locate the weapons. (RP 38, Feb. 9, 2011)

At the conclusion of the testimony, the court held that Mr. Sosa was living at the residence (No. 110) and that he had authority

to consent to the search of the residence. (RP 44, Feb. 9, 2011)¹
The court then decided that the search of the residence was for
persons and that the search was for that purpose. (RP 45, Feb. 9,
2010) The court then ruled that the State failed to meet its burden
as it failed to call Officer Chiprez to testify how he located the
weapons. (RP 45 Feb. 9, 2011) The court then granted the Motion
to Suppress the evidence.

Shortly thereafter, the State moved the court for
reconsideration of the Suppression Order and permission to present
additional testimony. (CP 10) Mr. Sosa opposed the request. (CP
24) The court granted the request and there was a second
Evidentiary Hearing was held on March 10, 2011.

Jose Chiprez

Officer Chiprez was at the 110 residence on April 24, 2010.
(RP 5, Mar. 10, 2011.) He went into the trailer and began a
protective sweep for other persons. (RP 7, Mar. 10, 2011) As he
searched the residence he came upon a coat closet in the hallway.
(RP 7, Mar. 10, 2011) In the closet underneath hanging clothing he
saw two shotguns. (RP 7, Mar. 10, 2011)

Victor Castillo

¹ Mr. Sosa challenges the Courts Finding 2.15 that he resided at the
residence and the finding that he had authority to grant consent to
the residence.

Mr. Castillo testified that he was in the trailer when the officers entered the trailer. (RP 13, Mar. 10, 2011) He was present when the officers were searching the trailer. He observed one officer open the hall closet door and then shut the door. (RP 14, Mar. 10, 2010). The closet was small closet. (RP 17, Mar. 10 2010) He also observed another officer open the hallway closet door a second time. (RP 15, Mar. 10, 2010) Mr. Castillo witnessed the second officer lean over and move stuff around. (RP 15, Mar. 10, 2010) The officer then stated he found guns.

At the conclusion of the testimony, the court denied the Motion to Suppress. (RP 24, Mar. 10 2010)

III. ARGUMENT

A. The Trial Court erred when it granted the State's Motion to Reconsider and Reopen the Evidentiary Hearing..

As noted herein, the court granted the State's Motion for Reconsideration of the decision to grant the Motion to Suppress. The court erred and should not have allowed the State to reopen the hearing and present additional evidence.

The State maintained that the only issue before the Court was the scope of the consent to search the closets. (CP 13) The State's view was too narrow and misapplied. The State was put on

notice that the alleged consent to search was not limited to just the closets but to the entire residence. (CP 27)

CrR 3.6(a) permits an evidentiary hearing at the court's discretion. 'It is within the discretion of the trial court to allow oral testimony, in addition to affidavits, when hearing a motion to suppress evidence.' State v. McLaughlin, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). Generally, the trial court has wide discretion to fashion a hearing at a stage of the proceedings where guilt is not an issue. State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985).

A criminal defendant is entitled to suppress evidence if the state violates his or her Fourth Amendment rights against illegal search and seizure. U.S. Const. amend. 4; Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961); Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) (Fourth Amendment is applicable to state action).

Clearly, give the wide latitude that the court has in exercising its discretion, the State cannot prevail on its interpretation that the issue was only the scope of the search the closets.

With regards to the State's request to reopen the Suppression Hearing, the court should not have allowed the State a second bite of the apple as it was untimely. At the time of the hearing, the State did not move for a continuance to present the

additional evidence. The court requested whether the State rested and the State did rest. As the State did not request a continuance, it should be precluded from now being allowed to reopen the proceedings to seek additional evidence. See State v. Barnett, 104 Wn. App. 191, 16 P.2d 74 (2001)(Court did not error were defendant moved to reopen his case to present testimony the following day after resting.)

The State had the opportunity to continue the Suppression Hearing once the Court put the State on notice that plain view was an issue. By failing to move to continue the hearing, the State waived any request to reopen the proceedings. As noted by the case law, a defendant cannot move to reopen his case the following day, thus the same should be said for the State. The court erred when it allowed the State to present the additional evidence.

B. The court erred when it denied the Motion to Suppress Evidence.

Mr. Sosa maintains that the court erred when it denied the Motion to Suppress the Evidence. He maintains that the consent to search by Mr. Sosa was invalid as he did not have authority to grant the request as the officers failed to establish he had control over the residence.

A criminal defendant is entitled to suppress evidence if the state violates his or her Fourth Amendment rights against illegal

search and seizure. U.S. Const. amend. 4; Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961); Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) (Fourth Amendment is applicable to state action).

As a general rule, warrantless searches and seizures are per se unreasonable. State v. Ladson, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999). The courts have, however, recognized a number of narrow exceptions that allow the police to conduct searches and seizures without a warrant. State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

One of the exceptions to the warrant requirement is consent to a search. State v. Leach, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989). The burden, however, is on the State to show that a consent to search was voluntarily given. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975).

The State must meet three requirements in order to show that a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the consent must not exceed the scope of the consent. State v. Nedergard, 51 Wn. App. 304, 308, 753 P.2d 526, review denied, 111 Wn.2d 1007 (1988); see also Robert

F. Utter, Survey of Washington search and Seizure Law, 9 U. Puget Sound L. Rev. 1, 112 (1985).

Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. State v. Leach, 113 Wn 2d 739, 782 P. 2d 1035 (1989)

Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a search. State v. Mathe, 102 Wn. 2d 537, 688 P.2d 859 (9184) The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. Leach at 113 Wn.2d 739

If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police. State v. Holmes, 108 Wash.App. 511, 519, 31 P.3d 716 (2001).

Division One of the Court of Appeals has held that a temporary guest does not have apparent authority to admit police officers to conduct a search or execute an arrest warrant. State v. Holmes, 108 Wash.App. 511, 519-20, 31 P.3d 716 (2001) (because the person who claimed to be a coinhabitant did not have a key, police officers should have doubted her authority to consent, despite her explicit assurance that she lived there); State v. Ryland, 65 Wash.App. 806, 829 P.2d 806 (1992) (a houseguest who had spent the previous night on the living room couch did not have apparent authority because the officer did not inquire into the extent of the guest's authority).

In the case at bar, the State did not establish that Mr. Sosa had the authority to consent to the search of the residence. The officers presented no testimony that Mr. Sosa had control over the residence. They did not have any documents of dominion or control. The officers also testified that Mr. Sosa lived at the residence on Ellice Avenue and that he purchased this property with his mother. Clearly the court erred when it determined that Mr. Sosa had authority to consent to the search of No. 110.

Finally, Mr. Sosa maintained that the officers exceeded the scope of consent to search. As noted in the testimony, the officers were at the residence looking for other persons. See State v. Ferrier, 136 Wn. 2d 103, 116 P.2d 927 (1998) When the officer

went into the closet for the second time and moved items out of the way and found the weapons he violated the scope of the consent and thus the search was in violation of the law.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the Order denying the Motion to Suppress be reversed and that this matter be dismissed.

DATED this 12 day of January 2011.

Respectfully Submitted,



Nicholas Marchi, WSBA 19982
CARNEY & MARCHI, P.S.
Attorneys for Appellant
JORGE SOSA

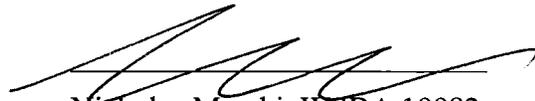
CERTIFICATE OF SERVICE BY MAIL

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on JAN-12, 2012, via postage prepaid, a true copy of the Amended Brief of the Appellant attached hereto to the following individuals:

Jose Cazares SOSA
P.O. Box 1815
Mattawa WA 99349

Angus Lee, Prosecuting Attorney
P.O. Box 37
Ephrata WA 98823

DATED this 12 day of January, 2011.


Nicholas Marchi, WSBA 19982