

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRENT RICHARD SMITH,

Petitioner.

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STATE OF WASHINGTON
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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON and WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the Fourth Amendment to the United States Constitution, prohibiting unreasonable searches and seizures. It also strongly supports adherence to Article 1, section 7 of the Washington Constitution. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 700 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL’s objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous amicus briefs in the Washington appellate courts.

STATEMENT OF THE CASE

Amici urge this Court to disavow the Court of Appeals’ expansion of the “protective sweep” and “community caretaking” exceptions to the warrant requirement, and to hold that these exceptions cannot justify the

warrantless search of the home that occurred in this case. Amici take no position on the application of the “exigent circumstances” exception here, as it is a highly fact-specific inquiry.

The relevant facts are as follows:

Several law enforcement officers responded to an anonymous tip that a stolen semi truck filled with anhydrous ammonia was located at a specific address in Benton County. State v. Smith, 137 Wn. App. 262, 266, 153 P.3d 199 (2007). Upon arrival, one officer approached the truck to determine if the tanks were leaking, and did not notice any leakage. Appellant’s Br. at 2.

The officers saw two individuals in an upstairs window of the home, and heard a dog barking. Smith, 137 Wn. App. at 266. They also observed a gun case through one of the windows. Id. They did not enter the house to perform a “protective sweep” at that point.

One officer knocked and announced his presence. Id. Eventually, Brent Smith and Kimberly Breuer came out of the house, along with their dog. Id. at 267; Appellant’s Br. at 3. The gun case that had been near the window was gone. Smith, 137 Wn. App. at 267.

The officers did not arrest Mr. Smith or Ms. Breuer. They asked the two if anyone else was inside the house, and Mr. Smith and Ms. Breuer responded that nobody else was there. Appellant’s Br. at 3.

Nevertheless, the officers decided to enter the house and conduct a “protective sweep” at that point because they “were uncertain as to whether there were additional people inside the house.” Smith, 137 Wn. App. at 267.

The officers did not find any people inside the house. Appellant’s Br. at 3. But they did find a portable methamphetamine (“meth”) lab, so they arrested Mr. Smith and Ms. Breuer. Mr. Smith was later charged with manufacture of methamphetamine. Smith, 137 Wn. App. at 267.

The trial court denied Mr. Smith’s CrR 3.6 motion to suppress the evidence, and Mr. Smith was convicted as charged. The Court of Appeals upheld the warrantless entry and search of the home on three independent bases: (1) the “protective sweep” exception, (2) the “exigent circumstances” exception, and (3) the “community caretaking” exception. Smith, 137 Wn. App. at 268-70. This Court granted review.

ARGUMENT

A. Exceptions to the warrant requirement must be jealously and carefully drawn, particularly in the context of the home.

Under the Fourth Amendment to the United States Constitution, warrantless searches are unreasonable *per se*, unless one of the few “jealously and carefully drawn” exceptions applies. State v. Hendrickson,

129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing, *inter alia*, Coolidge v. New Hampshire 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971)). The State bears the burden of proving the validity of a warrantless search. Hendrickson, 129 Wn.2d at 70.

Nowhere is the warrant requirement more stringent than in the home. “Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). A person’s house is “the area most strongly protected by the constitution.” State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Thus, “with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

In this case, the Court of Appeals held that three different exceptions independently justified the warrantless entry and search of the house. In so doing, the court significantly expanded the “protective sweep” and “community caretaking” exceptions to the warrant requirement. This Court should reject the Court of Appeals’ encroachment on the right to privacy, and hold that neither the “protective

sweep” nor “community caretaking” exceptions justify the search in this case.¹

B. The “protective sweep” exception to the warrant requirement does not apply.

One exception to the warrant requirement under the Fourth Amendment is the “protective sweep.”² Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

A “protective sweep” is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.

Id. The search lasts “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Id. at 335-36.

The predicate of an arrest is sufficient to support a protective sweep “in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Id. at 334. “Beyond that, however, ... there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a

¹ Amici take no position on the application of the “exigent circumstances” exception to the facts of this case.

² This Court has never considered whether the “protective sweep” exception exists under article 1, section 7 of the Washington Constitution, and if so, what its parameters are. The Court need not reach that issue here, because even under the Fourth Amendment the exception cannot apply to the facts of this case.

reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Id. In sum:

The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. at 337.

Consistent with the plain language of Buie, the Ninth and Tenth Circuits have limited the “protective sweep” exception to situations in which individuals have been arrested. United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006); United States v. Reid, 226 F.3d 1020, 1027 (9th Cir. 2000). Even the circuit courts that extended the protective sweep exception beyond the arrest scenario require *some* lawful predicate for entry into the home; the protective sweep doctrine does not itself provide such justification. See, e.g., United States v. Gould, 364 F.3d 578, 584 (5th Cir. 2004)(en banc), cert. denied, 543 U.S. 955, 125 S.Ct. 437, 160 L.Ed.2d 317 (2004) (upholding sweep after occupant consented to entry). As the Fifth Circuit stated, “the police must not have entered (or remained in) the home illegally and their presence within it must be for a legitimate law enforcement purpose.” Id. at 587; see also United States v. Taylor, 248 F.3d 506, 513 (6th Cir. 2001) (entry justified by consent); United

States v. Daoust, 916 F.2d 757 (1st Cir. 1990) (entry justified by search warrant).

The search of the home in this case cannot be justified as a protective sweep under the plain language of Buie, because Mr. Smith and his companion were not under arrest when the sweep occurred. And even under the broader view of Gould et al., the protective sweep exception does not apply here because the officers did not enter the home with an independent lawful purpose. Mr. Smith and his companion were outside, and did not consent to the officers' entry of their house. The officers had neither an arrest warrant nor a search warrant.

The only potentially lawful basis for entry was the exigent circumstances exception, but if that exception justified the entry, it also would have justified the search on its own merit, without resort to a protective sweep exception. Because the protective sweep exception cannot itself provide a valid basis for entry into the home, the Court of Appeals erred in applying it to this case.

Finally, the officers' search could not have been justified by the protective sweep exception here because they did not reasonably believe the home harbored a dangerous individual. See Buie, 494 U.S. at 334. Both people the officers had seen inside the home had come outside and stated that nobody else was in the house.

A “general desire to be sure that no one is hiding in the place searched is not sufficient to justify a protective sweep outside the immediate area where an arrest has occurred.” State v. Hopkins, 113 Wn. App. 954, 960, 55 P.3d 691 (2002) (citations omitted). Rather, the suspicion must be specific. Compare, e.g., United States v. Paopao, 469 F.3d 760, 763 (9th Cir. 2006) (protective sweep justified by concern that the other named suspect was still in the apartment); with United States v. Akrawi, 920 F.2d 418 (6th Cir. 1990) (Buie standard not met where officers arrested cocaine importer and distributor at home, absent specific facts indicating another dangerous individual actually present at the time); see also 3 Wayne R. LaFave, Search and Seizure, § 6.4(c) at 377 (4th ed. 2004) (protective sweep requires reasonable suspicion that both (a) another person is there, and (b) the person is dangerous). Thus, the Court of Appeals erred in concluding that because the officers “did not know if individuals were present in the home or adjacent buildings” the protective sweep exception justified the search. 137 Wn. App. at 268.

In sum, the protective sweep exception does not apply here because it did not occur incident to an arrest and the officers had neither a warrant nor consent to enter the house. Even if entry into the home had been lawful, the protective sweep exception could not justify the search in this case because the officers did not reasonably believe the house

harbored a dangerous person. This Court should reject the “protective sweep” justification for the search in Mr. Smith’s case.

C. The “community caretaking” exception to the warrant requirement does not apply.

1. Police officers engage in “community caretaking” when they provide emergency aid or make routine checks on health and safety, not when they investigate crimes.

The Court of Appeals’ reliance on the “community caretaking” exception should similarly be rejected. It is true that law enforcement officers do not violate the Fourth Amendment when they engage in “community caretaking functions.”³ Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Indeed, it is part of a police officer’s job to assist citizens “in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid.” State v. Kinzy, 141 Wn.2d 373, 387, 5 P.3d 668 (2000). But to fall within this exception, police action must be “totally divorced from the detection investigation, or acquisition of evidence relating to the violation of a criminal statute.” Dombrowski, 413 U.S. at 441.

³ This Court has not yet addressed the parameters of the “community caretaking” exception under article 1, section 7. See State v. Kinzy, 141 Wn.2d 373, 385 n.33 & n.38, 5 P.3d 668 (2000). The Court need not reach that issue here, because even under the Fourth Amendment the exception cannot apply to the facts of this case.

Dombrowski was premised largely on the reduced privacy interest in a car relative to a home. See id. at 439-42; United States v. Erickson, 991 F.2d 529, 532 (9th Cir. 1993). However, this Court has recognized two additional contexts in which the community caretaking exception may apply: (1) emergency aid, and (2) routine checks on health and safety.⁴ Kinzy, 141 Wn.2d at 386. The former arises when an officer reasonably believes a person is “in danger of death or physical harm.” Id. at 387 n.39. The latter occurs in less urgent situations, and triggers a lesser intrusion. See, e.g., State v. Acrey, 148 Wn.2d 738, 753, 64 P.3d 594 (2003) (police officers directed 12-year-old to sit on sidewalk for a few minutes while they called his mother); Kalmas v. Wagner, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997) (individuals called 911 to prevent their landlord from entering their apartment, then invited officers into their home upon arrival).

As with all exceptions, the State must show that an intrusion under the community caretaking exception was both justified at its inception and properly limited in scope. An intrusion is not justified under the

⁴ The United States Supreme Court appears to view the emergency aid doctrine as a subcategory of the exigent circumstances exception to the warrant requirement, while this Court classifies it as a subset of community caretaking. Compare Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) with Kinzy, 141 Wn.2d at 387 n.39. The classification is immaterial for purposes of this case; the point is that the police officers did not enter the dwelling to render emergency aid, and any attempt to justify the warrantless entry and search on such a basis must be rejected.

community caretaking function unless (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

Even if the State shows the intrusion was justified by a “noncriminal, noninvestigatory purpose,” it must also show the scope of the intrusion was reasonable. The reasonableness of the search or seizure “depends on a balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a ‘community caretaking function.’” Thompson, 151 Wn.2d at 802 (quoting Kalmas, 133 Wn.2d at 216-17).

Courts must “cautiously apply the community caretaking function exception because of a real risk of abuse in allowing even well-intentioned stops to assist.” Kinzy, 141 Wn.2d at 388 (internal quotations omitted). The exception “may not be used as a pretext for a criminal investigation.” Id. at 394.

2. The police officers here were investigating a crime, not rendering emergency aid or performing a health and safety check.

The law enforcement officers in this case were investigating crimes: theft of a semi truck and manufacture of methamphetamine. Smith, 137 Wn. App. at 266. The community caretaking exception cannot justify their search of the house because they were not rendering aid or performing a health and safety check.

Officers may enter a dwelling under this exception only if they reasonably believe there is a person or persons “in danger of death or physical harm.” See Kinzy, 141 Wn.2d at 387 n.39. For example, the Court of Appeals properly upheld an entry and search under the community caretaking exception in State v. Gocken, 71 Wn. App. 267, 857 P.2d 1074 (1993). There, several people called the police to check on a 72-year-old woman with mental health problems whom they had not heard from in some time. Id. at 269-70. The woman’s niece asked the officers to enter the home to see if the woman was sick or injured. Id. at 271. The officers went inside briefly, smelled decaying flesh and saw coagulated blood, then left and secured a warrant before returning to find a dead body. Id. at 271-72. The court upheld the brief intrusion because it “was clearly intended to be a routine check on [the woman’s] welfare,”

and as soon as it turned into a homicide investigation the officers obtained a warrant. Id. at 277.

In contrast, the officers in this case were not checking on anyone's welfare. The two people they had seen inside the house were outside, and had told the officers that nobody remained inside the home.

The Court of Appeals has properly rejected application of the "community caretaking" exception in several cases analogous to this one. In State v. Lawson, 135 Wn. App. 430, 432, 144 P.3d 377 (2006), an anonymous citizen reported a strong, ammonia-like smell that burned her eyes and throat, coming from the defendant's house. A responding sheriff's deputy noted a strong chemical odor emanating from a shed, so she entered the shed and found a meth lab. Id. at 432-33. The Court of Appeals suppressed the evidence, stating:

Generally, we have endorsed an emergency entry only where the officers reasonably believed that a specific person or persons needed immediate help for health or safety reasons. ... We are unwilling to extend the doctrine to authorize warrantless entries where the officers express only a generalized fear that methamphetamine labs and their ingredients are dangerous to people who might live in the neighborhood.

Id. at 437-38.

In State v. Link, 136 Wn. App. 685, 150 P.3d 610 (2007), the court held the community caretaking exception could not justify a home search,

even though the officer knew young children were in the apartment and he smelled the strong odor of acetone, which is highly flammable. The warrantless intrusion was improper because the officer's primary motivation was to investigate a possible meth lab, not to immediately render aid. Id. at 696.

In State v. Leffler, 142 Wn. App. 175, 180, 173 P.3d 293 (2007), the court rejected application of the exception even where the officers knew there was muriatic acid and a "gasser" inside the trailer in question, and officers testified that meth labs can explode or emit fatal phosphene gas. The community caretaking exception did not apply because there was "not an imminent threat of substantial harm." Leffler, 142 Wn. App. at 178. Other cases are in accord. See, e.g., State v. White, 141 Wn. App. 128, 168 P.3d 459 (2007) (officer's entry into home not justified by community caretaking exception even though he smelled a strong odor of ammonia); State v. Schlieker, 115 Wn. App. 264, 62 P.3d 520 (2003) (claimed emergency a mere pretext because deputies were on site to investigate allegations of trespassing and drug activity and had no information that the people inside the trailer were injured).

In all of these cases, the court has properly delineated the distinction between criminal investigation and community caretaking. As part of the former, police officers may enter and search a home with a

warrant, with consent, or based on exigent circumstances. But they may not use the community caretaking function as a pretext to justify a warrantless intrusion.

The entry and search of a home constitutes a severe invasion of Fourth Amendment rights. See Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The general desire to ascertain whether there were additional people in the house cannot trump that right.

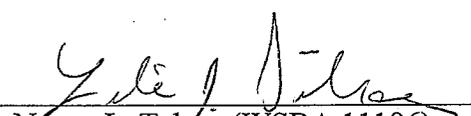
The community caretaking exception does not apply here because officers were investigating a crime, not rendering emergency aid or performing a health and safety check. Even if the officers had responded to the scene for a community caretaking purpose, the intrusion into the quintessential zone of privacy – the home- cannot be justified by the officers' desire to confirm the absence of other occupants. The Court of Appeals erred in uphold the search under the community caretaking exception.

CONCLUSION

For the foregoing reasons, the ACLU and WACDL respectfully ask this Court to hold that neither the “protective sweep” exception nor the “community caretaking” exception justifies the warrantless search of a home in this case.

Respectfully submitted this 14th day of April, 2008.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 79917-2-I
v.)	
)	
BRENT SMITH,)	
)	
Petitioner.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 14TH DAY OF APRIL, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF AMICI CURIAE** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREW MILLER	(X)	U.S. MAIL
HEATHER CZEBOTAR	()	HAND DELIVERY
BENTON COUNTY PROSECUTOR'S OFFICE	()	_____
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[X] DENNIS MORGAN	(X)	U.S. MAIL
120 W MAIN	()	HAND DELIVERY
RITZVILLE, WA 99169	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF APRIL, 2008.

X _____
jm