

82238-7

No. 36928-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Patricia Schultz,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Clallam County Superior Court

Cause No. 05-1-00114-2

The Honorable Judge Kenneth D. Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The officers violated Ms. Schultz's right to privacy under Article I, Section 7 of the Washington State Constitution.
2. The trial court erred by failing to suppress items seized from Ms. Schultz's residence.
3. Officer Malone unlawfully entered Ms. Schultz's residence without a warrant.
4. Officer Hill unlawfully entered Ms. Schultz's residence without a warrant.
5. The officers violated Ms. Schultz's right to be free from unreasonable searches and seizures under the Fourth Amendment.
6. Ms. Schultz was arrested without probable cause.
7. The search warrant affidavit lacked probable cause to search for evidence of drug sales.
8. The search warrant was unconstitutionally overbroad.
9. The trial judge erred by entering Finding of Fact No. 2, which reads as follows:

On arrival, the officers went to the apartment in question and listened outside, at a closed door, to a male and female who were yelling and arguing with each other.
CP 20.
10. The trial judge erred by entering Finding of Fact No. 7, which reads as follows:

At that point the defendant stepped away from the door, opening it further, and the officers entered.
CP 21.
11. The trial judge erred by entering Finding of Fact No. 8, which reads as follows:

The officers testified that they were not expressly invited in, neither did they request permission to enter.

CP 21.

12. The trial judge erred by entering Finding of Fact No. 9, which reads as follows:

Officer Hill asked Mr. Robertson to step outside in order that he could interview him away from the defendant.

CP 21.

13. The trial court erred in entering the following conclusion of law:

The officers' testimony is clear that, upon arrival at the apartment, they were able to overhear shouting and arguing coming from within the apartment, despite the fact that the door was closed.

It is clear that law enforcement officers have an affirmative duty to investigate domestic violence situations with a view to ensuring "the present and continued safety and well-being of the occupants." *State v. Raines*, 55 Wn.App. 459 (1989). See also *State v. Lynd*, 54 Wn.App. 18 (1989).

...It was quite feasible that the officers could think these [red blotches] were the results of an assault.

In order to ensure the safety of occupants, officers must talk to those possibly involved.

...They had the right, and duty, to be present to talk to the occupants. It is noted that neither party told them to leave and that the defendant initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave.

In conclusion, the Court concludes that both officers were acting within the confines of the law. They were performing their legal duties when they entered the apartment to investigate a possible domestic violence situation. Their entry was legal and even required under state law. They were therefore lawfully in a place to observe the contraband or paraphernalia, the result of the defendant's uncooperative actions. Therefore they had, based on their observations and statements from Robinson, probable cause to apply for and execute a search warrant.

CP 23-24.

14. The trial court erred in concluding the following in his Memorandum Opinion:

The warrant at issue specifies the crime as VUCSA which is the commonly used "shorthand" for violation of the uniform

controlled substances act. The warrant specifies the items to be seized as marijuana and methamphetamine and items associated with the use and sale of those controlled substances. The information provided by Officer Hill in support of the probable cause specifies that he personally observed items with burnt marijuana, and items he recognized as used to ingest methamphetamine. With regard to the possible sale of controlled substances he observed "numerous plastic baggies" in the vicinity of the items associated with controlled substances which are commonly used to package controlled substances for sale.

The search warrant was supported by probable cause, and is not overly broad as it specifies both the crime under investigation (VUCSA) and the items to be seized which are associated with that crime.

Memorandum Opinion, Supp. CP.

15. The trial judge erred by denying Ms. Schultz's motions to suppress.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

After receiving reports of a couple arguing loudly, Officers Malone and Hill went to Patricia Schultz's residence. They heard yelling, and knocked on the door. Ms. Schultz opened the door and initially denied that anyone else was present, but then stepped aside to reveal her then-boyfriend (now husband) coming from a back room. Officer Malone entered the residence to speak with Ms. Schultz; Officer Hill spoke with Mr. Robertson outside. After both officers confirmed that no domestic violence had occurred, Officer Hill entered the residence and observed a marijuana pipe and items for ingesting methamphetamine. Ms. Schultz was arrested, and the officers obtained a search warrant to search for evidence of drugs and drug sales.

1. Did Officer Malone's warrantless entry into the residence violate Ms. Schultz's state constitutional right to privacy under Article I, Section 7? Assignments of Error Nos. 1-4, 15.

2. Did Officer Hill's warrantless entry into the residence violate Ms. Schultz's state constitutional right to privacy under Article I, Section 7? Assignments of Error Nos. 1-4, 15.

3. Did the arrest of Ms. Schultz without probable cause violate her constitutional rights under the Fourth Amendment and Article I, Section 7? Assignments of Error Nos. 1-2, 5-6, 15.

4. Did the officers lack probable cause to believe evidence of drug sales would be found inside the residence? Assignments of Error Nos. 5, 7-8, 15.

5. Was the search warrant overbroad because it authorized a search for evidence of drug sales despite the absence of probable cause to believe such evidence would be found in the residence? Assignments of Error Nos. 5, 7-8, 15.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A neighbor of Patricia Schultz and Sam Robertson called the police, complaining that a man and woman were yelling in the upstairs apartment. RP (8/2/05) 12, 26, 60. Officers Malone and Hill went to the apartment and stood outside listening. RP (8/2/05) 11-13, 25. They heard a man and woman "talking loudly," with the man saying that he wanted to leave and needed some space. RP (8/2/05) 13, 46. Officer Hill described it as not a yell, but a raised voice. RP (8/2/05) 61.

The officers knocked and Ms. Schultz opened the door. RP (8/2/05) 14. When asked, Ms. Schultz told the officers that no one else was there. RP (8/2/05) 14. After the officers said that they heard a man's voice, Ms. Schultz "then stepped back and she called for Sam," who came out of a room in the back of the apartment. RP (8/2/05) 14-15. As Mr. Robertson came to the door, Ms. Schultz opened it wider and stepped back, and Officer Hill took Mr. Robertson outside. RP (8/2/05) 63. Officer Malone then entered the apartment. RP (8/2/05) 15, 77-78. According to Officer Malone, she did not tell Ms. Schultz of her right to prevent entry because "I was going in to talk to her". RP (8/2/05) 28. Once inside, the officer did not see any signs of violence. RP (8/2/05) 29, 52-53.

Ms. Schultz was agitated and flushed, moving around the apartment and trying to pick up and move various items. Officer Malone ordered her to sit at the table. RP (8/2/05) 16, 56. Ms. Schultz explained that her neck gets red when she is upset, and she told the officer several times that the couple had been arguing verbally only, not physically. RP (8/2/05) 17-18, 32, 35. Officer Malone described Ms. Schultz as fidgeting while seated at the table, and the officer instructed her to sit still or she would be handcuffed. RP (8/2/05) 18-19, 30-31. Officer Malone testified that this warning—that Ms. Schultz might be handcuffed—occurred early on in their interaction. RP (8/2/05) 29-30.

Officer Hill had taken Mr. Robertson out onto the porch, and spoke to him while standing in the open doorway. RP (8/2/05) 63. He, too, learned quickly that no violence had taken place. RP (8/2/05) 79, 82. After learning there had been no violence, Officer Hill went into the apartment. After he entered, Ms. Schultz moved an item on the table, revealing a gun and a pipe. RP (8/2/05) 19, 65-68. Officer Hill asked Ms. Schultz about the gun, seized it and unloaded it, and then asked her about the pipe. RP (8/2/05) 19-21, 67. Ms. Schultz told him the pipe was her son's, and that she knew it was there. RP (8/2/05) 21, 68. Officer Hill asked if he could search the very cluttered table for narcotics, and Ms. Schultz agreed, standing and grabbing at items. RP (8/2/05) 21, 39-40.

Officer Malone handcuffed her and told her she was not under arrest, but later acknowledged (during her testimony) that Ms. Schultz had not made any aggressive movements or statements, and that she would not have let Ms. Schultz leave if she had tried to. RP (8/2/05) 21-23, 38, 54.

Ms. Schultz repeatedly asked the officer if she could get up, and was refused permission. RP (8/2/05) 45. Officer Malone testified that she intended to talk with Ms. Schultz even if Ms. Schultz did not want to talk with her. RP (8/2/05) 45.

At this point, Ms. Schultz asked for her anxiety medication, and Mr. Robertson helped Officer Hill to find it and give it to Ms. Schultz. RP (8/2/05) 23, 42-43, 70. Ms. Schultz withdrew her permission for the officers to search the table, and was forced to wait while the officers obtained a telephonic warrant. RP (8/2/05) 24-25, 71. The officers then searched the entire apartment and discovered methamphetamine.

Ms. Schultz was charged by Information with Possession of Methamphetamine. CP 25. She demanded a 3.6 hearing, arguing that the initial entry was unlawful and that she was arrested without probable cause. At that hearing, the court ruled that the evidence was admissible, and made findings of fact that included the following:

2. On arrival, the officers went to the apartment in question and listened outside, at a closed door, to a male and female who were yelling and arguing with each other.

...

7. At that point the defendant stepped away from the door, opening it further, and the officers entered.

8. The officers testified that they were not expressly invited in, neither did they request permission to enter.

9. Officer Hill asked Mr. Robertson to step outside in order that he could interview him away from the defendant.

CP 20-21

In support of its decision to admit the evidence, the court entered the following conclusions of law:

The officers' testimony is clear that, upon arrival at the apartment, they were able to overhear shouting and arguing coming from within the apartment, despite the fact that the door was closed.

It is clear that law enforcement officers have an affirmative duty to investigate domestic violence situations with a view to ensuring "the present and continued safety and well-being of the occupants." *State v. Raines*, 55 Wn.App. 459 (1989). See also *State v. Lynd*, 54 Wn.App. 18 (1989).

...It was quite feasible that the officers could think these were the results of an assault.

In order to ensure the safety of occupants, officers must talk to those possibly involved.

... They had the right, and duty, to be present to talk to the occupants. It is noted that neither party told them to leave and that the defendant initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave.

In conclusion, the Court concludes that both officers were acting within the confines of the law. They were performing their legal duties when they entered the apartment to investigate a possible domestic violence situation. Their entry was legal and even required under state law. They were therefore lawfully in a place to observe the contraband or paraphernalia, the result of the defendant's uncooperative actions. Therefore they had, based on

their observations and statements from Robinson [sic], probable cause to apply for and execute a search warrant.
CP 23-24.

After receiving a copy of the search warrant, the defense also sought to suppress the fruits of the search by challenging the search warrant as overbroad. The warrant authorized law enforcement to search for, among other things, the following:

Methamphetamine and Marijuana in their various forms, items commonly used in the ingestion of methamphetamine and marijuana, including but not limited to pipes, bongs, straws and hypodermic needles; items associated in packaging and sales of controlled substances including monies, plastic sandwich baggies, envelopes; or other containers used to hold controlled substances and indicia of occupancy.
Search Warrant, Supp. CP.

The court denied the motion in a Memorandum Opinion, which included the following:

The warrant at issue specifies the crime as VUCSA which is the commonly used "shorthand" for violation of the uniform controlled substances act. The warrant specifies the items to be seized as marijuana and methamphetamine and items associated with the use and sale of those controlled substances. The information provided by Officer Hill in support of the probable cause specifies that he personally observed items with burnt marijuana, and items he recognized as used to ingest methamphetamine. With regard to the possible sale of controlled substances he observed "numerous plastic baggies" in the vicinity of the items associated with controlled substances which are commonly used to package controlled substances for sale.

The search warrant was supported by probable cause, and is not overly broad as it specifies both the crime under investigation (VUCSA) and the items to be seized which are associated with that crime.

Memorandum Opinion, Supp. CP.

Ms. Schultz was convicted as charged after a stipulated trial, and this timely appeal followed. CP 6-19, 5.

ARGUMENT

I. THE OFFICERS VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION BY INVADING PATRICIA SCHULTZ'S HOME WITHOUT AUTHORITY OF LAW.

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. Because citizens are entitled to the greatest privacy in their own homes, Article I, Section 7 applies with greatest force when officers intrude into a dwelling. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

Searches conducted without a warrant are presumed to be unconstitutional. Wash. Const. Article I, Section 7; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Wheless, supra*. The burden is always on the State to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107

Wn.App. 280 , 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *Kypreos*, 616 (2002).

There is no generalized “domestic violence exception” to the warrant requirement. In very limited circumstances, officers may enter a home under the emergency exception. The emergency exception permits warrantless entry when “(1) the officer subjectively believes that someone needs assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched.” *State v. Leffler*, ___ Wn.App. ___ at ___, 173 P.3d 293 (2007). The exception applies only “where there is an imminent threat of substantial injury...” *Leffler*, ___. Furthermore, the officers must reasonably believe that a specific person or persons need immediate help for health or safety reasons. *Leffler*, ___.

It is not a crime for a couple to argue, to raise their voices, or to declare their need for “space” from each other. In this case, Officer Malone entered Ms. Schultz’s home without a warrant, without a reasonable belief that a specific person needed immediate help, and in the absence of an imminent threat of substantial injury. If the officers wished to investigate, nothing prevented them from asking both parties to step outside, where they could be interviewed separately and kept apart from

each other. In the alternative, Officer Malone could have interviewed Ms. Schultz from the doorway, while Officer Hill interviewed Mr. Robertson outside. Under the circumstances, Officer Malone's entry violated Ms. Schultz's constitutional right to privacy, and requires suppression of the items subsequently seized. *Leffler, supra*.

Officer Hill entered with even less justification, since at the time he crossed the threshold, both officers had already confirmed that no domestic violence occurred. Under these circumstances, Officer Malone should have stepped outside to confer with Officer Hill. Hill's warrantless intrusion further violated Ms. Schultz's constitutional right to privacy under Article I, Section 7. Accordingly, this Court must suppress the evidence unconstitutionally obtained through Hill's unlawful entry. *Leffler, supra*. Ms. Schultz's convictions must be reversed and the case dismissed. *Leffler, supra*.

II. THE OFFICERS VIOLATED ARTICLE I, SECTION 7 BY ARRESTING PATRICIA SCHULTZ WITHOUT PROBABLE CAUSE.

A warrantless arrest is unlawful unless supported by probable cause, defined as "facts sufficient to cause a reasonable [officer] to believe that an offense has been committed..." *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007), quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

The exclusionary rule requires suppression of evidence derived directly or indirectly from illegal police conduct. *State v. McReynolds*, 117 Wn. App. 309, 322, 71 P.3d 663 (2003), citing *State v. Tan Le*, 103 Wn. App. 354, 360-61, 12 P.3d 653 (2000). Evidence uncovered following an illegal arrest is inadmissible unless the state can establish that it was obtained by means sufficiently distinguishable to be purged of the primary taint. *McReynolds*, 322. To prove that the evidence was purged of taint, the state must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means. *McReynolds*, 322, citing *Tan Le*, *supra*. Additional factors to be considered include temporal proximity between the illegality and the seizure, and the purpose and flagrancy of the official misconduct. *McReynolds*, 322.

Possession of drug paraphernalia is not a crime. RCW 69.50; *State v. O'Neil*, 104 Wn.App. 850, 17 P.3d 682 (2001). Use of drug paraphernalia is a misdemeanor offense. RCW 69.50.412. It is not one of the enumerated offenses that justifies a custodial arrest whenever an officer develops probable cause; instead, a custodial arrest for use of drug

paraphernalia is authorized only when the offense is committed in the officer's presence. RCW 10.31.100.

In this case, the trial court found that the officers arrested Ms. Schultz. RP 140-141; Finding of Fact No. 25, CP 22. The state has not cross-appealed that finding, and it is a verity on appeal. *Moore*, at 884. At the time of her arrest, the officers had not developed probable cause to believe that any crime had been committed; even if they believed she had used drug paraphernalia previously, such use did not justify a custodial arrest. RCW 10.31.100. Accordingly, this Court must suppress the evidence obtained subsequent to Ms. Schultz's unlawful arrest. Her convictions must be reversed and the case dismissed. *McReynolds*.

III. THE SEARCH WARRANT WAS OVERBROAD AND VIOLATED THE FOURTH AMENDMENT BECAUSE THE OFFICERS LACKED PROBABLE CAUSE TO BELIEVE THEY'D FIND EVIDENCE OF DRUG SALES IN THE RESIDENCE.

The Fourth Amendment to the Federal Constitution provides

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 Warrants 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.

U.S. Const. Amend. IV.

A warrant is overbroad when it authorizes seizure of items for which probable cause does not exist. *State v. Maddox*, 116 Wn.App. 796,

805, 67 P.3d 1135 (2003). A search warrant that is overbroad is invalid regardless of whether the officers who executed the warrant conducted an overbroad search. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993). In such cases, the warrant itself is invalid, regardless of how it is executed.

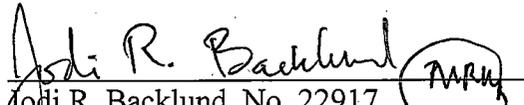
Here, the telephonic affidavit provided probable cause to seize drug paraphernalia and associated residue. Affidavit, Supp. CP. Nothing suggested that a search of the residence would reveal evidence of drug sales, including "monies." Search Warrant, Supp. CP. Because the warrant was overbroad, the search was unlawful. The evidence must be suppressed and the case dismissed with prejudice. *Riley, supra*.

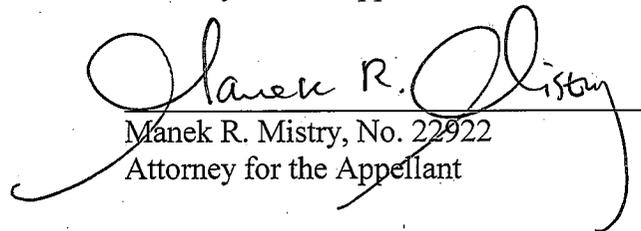
CONCLUSION

Officer Malone violated Article I, Section 7 when she entered Ms. Schultz's house without a warrant to investigate reports a couple arguing. Officer Hill further violated the constitution when he entered after both officers had confirmed that no domestic violence had occurred. In addition, the warrant the officers later obtained was tainted by the two illegal entries and was unconstitutionally overbroad. For all these reasons, the evidence must be suppressed and the case dismissed with prejudice.

Respectfully submitted on February 12, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

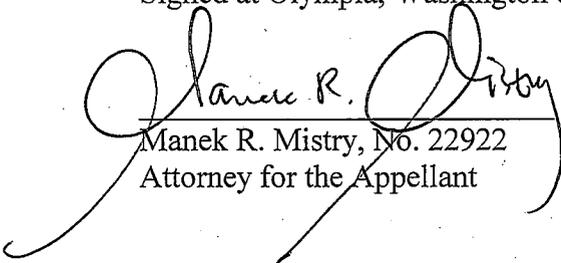
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 12, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 12, 2008.


Manek R. Mistry, No. 22922
Attorney for the Appellant

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