No. 91529-6

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Division III
State of Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

No. 31638-6-III

Grant County Superior Court No. 10-1-00061-8

STATE OF WASHINGTON
Respondent,

vs.

MICHAEL ALLEN BUDD
Appellant.

APPELLANT'S BRIEF

/s/

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied suppression of the evidence seized during the search of the Defendant's home when such search did not comply with the requirements of *Ferrier*.

2. The trial court erred when it found that the Defendant consented to the police entry into his home after the officer stated that she "could and would obtain a warrant."

Issues Pertaining to Assignments of Error

Did the trial court err when it denied suppression of the evidence seized during the search of the Defendant's home when such search did not comply with the requirements of *Ferrier*. (Assignment of Error 1)

Did the trial court err when it found that the Defendant consented to the police entry into his home after the officer stated that she "could and would obtain a warrant." (Assignment of Error 2)

II. STATEMENT OF THE CASE

On February 5, 2010 an Information was filed in the Grant County Superior Court. The Information was based upon a Motion for Arrest. CP 1-2, 3-7

A CrR 3.6 motion was heard on February 1, 2011. The basis of the motion was that the officer improperly obtained consent to search by stating that she could and would obtain a warrant if the defendant did not voluntary consent to

a “pre-view” of his computer. Another basis for the motion was that the entry into the house not preceded with required warnings in violation of *Ferrier*. CP 13

On June 20, 2011, Judge John Knodell denied the defendant's motion to suppress evidence, holding inter alia that the detective made no threats or promises to induce the Defendant's consent. Judge Knodell also concluded that the Defendant gave voluntary consent for the search and that the troopers did not violate *Ferrier* by entering the home initially to go over the Defendant's rights before commencing the search. CP 124-129

The parties stipulated to a record to be presented to the bench in a stipulated facts trial. CP 130-398[1] The stipulation provided that the following documents would be submitted for Judge Knodell's review in order for him to make a bench decision as to the Defendant's guilt. The following materials were submitted:

1. Police report of Detective Kim Holmes

2. January 15, 2009 anonymous "Cybertip"

3. Yahoo search warrant and affidavit by Detective Holmes and signed order

4. Google search warrant and affidavit by Detective Holmes and signed order

5. Home search warrant affidavit of Detective Holmes

6. Home search warrant signed by Judge

7. Washington State Patrol Consent to Search Form

[1] The Document 107 page numbering in the Superior Court index is in error. The backs of several pages have been scanned and are blank. Actually, the document is 269 pages long including these scanned blank pages. The court index reports only 268 pages. The Superior Court has been contacted regarding this error.

8. July 9, 2010 interview of Detective Holmes

9. Court testimony of Detective Holmes for 3.5/3.6 hearing

10. November 3, 2010 interview of Sgt. Rigolado

11. Exhibit "A" March 24, 2011 Defense Exhibit "Model Search Warrant Affidavit"

12. Exhibit "B" March 24, 2011 Defense Exhibit "Whois Search of IP address"

13. Exhibit "C" "Static IP vs. Dynamic IP"

14. The Defense and State stipulate to the photographs taken off of Defendant's computer on or about March 18, 2009 of images of child pornography. The Grant County Prosecutor's Office will hold this disk in their file to be released only if requested by the judge for viewing.

On April 29, 2013, findings of fact and conclusions of law were entered for both the CrR 3.6 hearing and for the stipulated facts trial. Judge Knodell found the Defendant guilty of the crime of Possession of Child Pornography (RCW 9.68A.070). Mr. Budd was sentenced on that same date.

A Notice of Appeal of the Judge's decision was timely filed on April 29, 2013. CP 399-400

Procedural History

On March 11, 2009, Detective Kim Holmes decided to contact Michael Budd after a two month investigation. RP 9; CP 188-190 The investigation was initiated by an anonymous tip received by e-mail. RP 5-6; CP 137-151 The anonymous tip stated that Mr. Budd had over 15 gigabytes of child pornography on his computer and that Mr. Budd “brags about (sexually) molesting his nine and a half year-old daughter.” RP 6; CP 137 Included with the anonymous email tip

were copies of two apparent "chat" conversations. CP 138-145 These chat conversations are sexual in nature. They are undated. They contain no information regarding the alleged participants, their ages or even the site from which they are alleged to have originated.[2] *Ibid*. The conversations do not discuss child pornography or any illegal activity. The chat conversations completely fail to substantiate or relate in any way to the anonymous claim that Mr. Budd was molesting his nine and a half year-old daughter or that he possessed child pornography.

Detective Holmes requested and was granted various search warrants to access Mr. Budd's email and other computer accounts based on her bare suspicions. RP 8; CP 134, 153-169, 231-235 Detective Holmes states in her report that "the return information did not help in my investigation." CP 134

Detective Holmes did not apply for a warrant to seize and to search Mr. Budd's computer, but instead traveled from Olympia to Ephrata, Washington for the purpose of contacting Mr. Budd in person. CP 192 Detective Holmes traveled together to Grant County with Sgt. Jesse Rigalotto and Tony Doughty, who were all members of her investigation team. RP 17; CP 193, 237

Mr. Budd was not at home when the team arrived. RP 10-11; CP 194, 241 They made contact with Mr. Budd's girlfriend who lived in the house and upon being informed that Mr. Budd was still at work, they indicated they would wait outside for him. *Ibid*.

When Mr. Budd arrived home, both Sgt. Rigalotto and Detective Holmes spoke with Mr. Budd. Mr. Budd was informed that a "cyber tip" had been received; that they believed that Mr. Budd possessed child pornography on his computer and that they were concerned for the welfare of his 9 year-old daughter.

[2] One lines of the chat states: "you shaved baby" CP 142

RP 12-13; CP 195-197 Detective Holmes' report indicates that Mr. Budd stated that "he suspected as much." Detective Holmes' asked how he knew and her report indicates that Mr. Budd stated: "You do it long enough, you eventually get caught." *Ibid*. Mr. Budd did not specifically state that he currently possessed child pornography. RP 13; CP 247

According to her report Detective Holmes then informed Mr. Budd that either he could give "voluntary" consent for the detectives to "preview" his computer or that I could and would obtain a search warrant." RP 15; CP 251

Based on only these warnings, Mr. Budd agreed to let the detectives enter his house.

The detectives then entered the house. Detective Doughty was a specialist in computer technology and was assigned to dismantle and seize Mr. Budd's computer and storage media. RP 23, 37; CP 296 Mr. Budd was then directed to be seated at his kitchen table. At that time, the WSP consent form was read to him which fully explained his rights related to his consent of the search. *Ibid*.

The detectives never investigated or spoke with Mr. Budd's daughter during their investigation. CP 251

III. ISSUES PRESENTED

A. May An Officer Meet The Requirements Of *Ferrier* If Such Officer Enters The Home To Be Searched Prior To Going Over The Full Content Of The *Ferrier* Warnings?

B. May An Officer Meet The Requirements Of *Ferrier* By Giving Most, But Not All, Of The *Ferrier* Warnings Orally Prior To Entering The Home To Be Searched?

C. Does An Officer Coerce Consent If An Officer States That If The Home Owner Did Not Consent That She "Could And Would Get A Warrant" When Probable Cause Has Not Yet Been Established?

Short Answers

A. No. *Ferrier* Remains A Bright-Line Rule. An Officer Must Comply With *Ferrier* By Going Over Each Of The *Ferrier* Warnings With A Home Owner.

B. No. To Establish That A Clear Waiver Of These Rights Occurred A Partial Warning Cannot Support A Waiver Of The *Ferrier* Rights.

C. Yes. In The Absence Of Probable Cause, An Officer May Not State That She Can And Will Get A Warrant For The Purpose Of Securing Consent To Search.

IV. ARGUMENT

A. The Officer Failed To Comply With *State v. Ferrier* Prior To Entering The Home.

It is well established that warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7 of our state constitution unless they fall within a few specifically established and well-delineated exceptions. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130, 135 (2000). Moreover, t"[ ]his constitutional protection is at its apex 'where invasion of a person's home is involved.'" *State v. Eisfeldt*, 163 Wn.2d 628, 635, 185 P3.d 580 (2008) (quoting *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), cert. denied, 552 U.S. 1275, 128 S.Ct. 1651, 1702L.dEd.385 (2008)).

1. *Ferrier* Warnings.

A warrantless search is presumed unreasonable, and exceptions to the warrant requirement are limited and carefully drawn. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979). For law enforcement to enter a home to conduct a search without a warrant, there must be exigent circumstances or consent.

Consent requires law enforcement to advise a home dweller of their right to refuse consent and of the rights to limit the scope of any search or to also withdraw consent for any search. See *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

In *Ferrier*, police had information that Ferrier had a marijuana grow operation in her house. Because they did not have probable cause to obtain a warrant, they conducted a knock and talk. When they knocked on Ferrier's door and identified themselves as police officers, she invited them in. Once inside, the officers told Ferrier they had information about a marijuana grow operation and that they wanted to search her house. She was asked to consent to a search, and she signed a consent form, but she was never told she had a right to refuse consent, nor was she informed of any other rights. *Ferrier*, 136 Wn.2d at 107-8.

Applying these principles, the Court concluded that the police violated Ferrier's state constitutional right to privacy in her home by conducting a knock and talk in order to search her home without obtaining a warrant, because they did not first advise her of her rights to refuse consent, to withdraw consent, or to limit

the scope of the search. *Ferrier* 136 Wn.2d at 115, 118-19. It adopted the following rule:

> While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. We, therefore, adopt the following rule: *that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.*

State v. Ferrier, 136 Wn.2d 103, 115-119, 960 P.2d927, 933-934 (1998). (emphasis added).

In the instant case, the detective did not provide Mr. Budd with all of the required warnings. From her testimony, Detective Holmes provided: "When he agreed to give consent, I explained to him that I had a waiver that he would need to sign, and it would give him rights as to how much we could search, that he could stop the search. I didn't go into great detail." "And after that, I went and got the warnings, the *Ferrier* form, out of my car and brought it. And that's when we went into the house and sat at the table where we could go over it more thoroughly." RP 16; CP 253 The detective provided that all three officers entered the house prior to obtaining the signed *Ferrier* warnings waiver from Mr. Budd. *Ibid*.

The detective did not possess probable cause that Mr. Budd had committed any of the offenses for which she had already sought and received

warrants to search his email and login accounts. It is questionable whether the detective possessed even a reasonable articulable suspicion to serve as legal basis for obtaining the search warrants for Mr. Budd's email accounts. These warrants produced nothing of any evidentiary value. CP 134 At the time of her contact with Mr. Budd, Detective Holmes had only a conclusory statement from an anonymous citizen informant that Mr. Budd had committed a crime.

The detective's statement to Mr. Budd that she "could and would get a warrant" seems questionable given the uncertain responses given by Mr. Budd CP 134

A tip from an informant does not constitutionally provide the police with this type of suspicion unless it possesses sufficient indicia of reliability. *Id*., at 799. In order to have sufficient indicia of reliability, the officer must have "(1) knowledge that the source of the information is reliable and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation." *Id*., at 799-800.

A tip provided by an anonymous and unidentified informant, which contains a mere inference that someone may be involved in criminal activity is completely lacking in indicia of reliability. *State v. Lesnick*, 10 Wn. App. 281, 285, 518 P.2d 199 (1973) aff'd 84 Wn.2d 940, 530 P.2d 243 (1975). Detective Holmes lacked any information regarding the source of the cyber-tip or any factual basis that could be corroborated by independent observation. Mr. Budd's statement "You do it long enough, you eventually get caught" doesn't provide enough information to ascertain a time frame or even a sufficient description of

criminal activity to support a warrant. Indeed, Detective Holmes stated that Mr. Budd was never placed under arrest. CP 249. Throughout the various interviews with Detective Holmes, Miranda warnings were never mentioned. There was no testimony that any rights were ever discussed with Mr. Budd except for the rights given in the *Ferrier* form once the detectives had already breached his home.

B. Exigent Circumstances Did Not Exist To Justify The Warrantless Entry Into The Residence.

Searches and seizures under either the federal or state constitution inside a home without a warrant are presumptively unreasonable. *State v. Ramirez*, 49 Wn.App. 814, 818, 746 P.2d 344 (Div. III 1987) citing *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); *State v. Daugherty*, 94 Wn.2d 263, 266-67, 616 P.2d 649 (1980), cert. denied, 450 U.S. 958, 101 S.Ct. 1417, 67 L.Ed.2d 382 (1981). Therefore, in the absence of consent or exigent circumstances, both the state and federal constitutions prohibit the warrantless entry into an individual's home in order to make a felony arrest even though probable cause may exist to arrest the individual. *Id.* citing *Payton*, 445 U.S. at 587-88, 590, 100 S.Ct. at 1380-81, 1382; *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985); see also *State v. Counts*, 99 Wn.2d 54, 60-61, 659 P.2d 1087 (1983). The State has the burden of showing that consent was voluntary by *clear and convincing* evidence. *State v. Nelson*, 47 Wn.App. 157, 163, 734 P.2d 516 (1987) (emphasis added).

The Washington Supreme Court has recognized five different exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or the public; (4) mobility of a vehicle; (5) mobility or destruction of the evidence. See *Counts*, at 60, 659 P.2d 89. Furthermore, in *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986) (citing *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C.Cir.1970)), the court enumerated six additional elements: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; and (6) the entry is made peaceably. *Ramirez*, 49 Wn.App. at 825, footnote 4, 746 P.2d 344 (Div. III 1987).

Detective Holmes at no point in her testimony offered that there was any exigent circumstance that would have prevented her from obtaining a warrant. The State also did not offer any argument that exigent circumstances were of any issue in the instant matter.

It is also worth noting that Mr. Budd's statement is not a clear "confession." It also doesn't appear that Mr. Budd was ever given Miranda rights at any time during the encounter.

Under cross examination during the CrR 3.6 hearing, the detective admitted that she had been unable to corroborate the cyber-tip. She further provided that the chat logs, which were of a sexual nature, did not refer to or mention the ages of the participants. RP 29; CP 280 Finally, it was revealed that

the undated chat logs did not actually provide that Mr. Budd either had or that he was planning to have sexual relations with his daughter. RP 30-1 47 The chat logs simply did not provide evidence of any specific crime or wrong-doing. *Ibid*.

1. The Potential Presence Of Child Pornography On A Computer Is Not An Emergency Justifying A Nonconsensual And Warrantless Entry Into A Residence.

The emergency exception to the search warrant requirement may be invoked only when: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched. *State v. Johnson*, 104 Wn.App. 409, 415, 16 P.3d 680, 683 (2001); See also *State v. Bakke*, 44 Wn.App. 830, 723 P.2d 534 (1986).

In the current case, there was no alleged emergency. It appears that the detectives entered the residence because they believed that Mr. Budd had consented to their entry. However, without the provision of the necessary *Ferrier* warnings to Mr. Budd in advance of the detectives entry into his home, consent cannot be found.

V. CONCLUSION

Mr. Budd's right to privacy in his home under Article 1 § 7 was violated by the warrantless search. Evidence seized during that search must be suppressed and the charge against Mr. Budd dismissed.

RESPECTFULLY SUBMITTED this 8th day of October, 2013.

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WASHINGTON STATE COURT OF APPEALS
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STATE OF WASHINGTON, Plaintiff/Respondent, vs. MICHAEL ALLEN BUDD, Defendant/Appellant.	NO. 31638-6-III Grant Co. Superior No. 10-1-00061-8 APPELLANT'S BRIEF CERTIFICATE OF SERVICE

I certify that on this 8th day of October, 2013, I caused to be sent by U.S. Mail, first-class postage prepaid, a copy of Appellant's Brief to:

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