

No. 93923-3

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Petitioner,

v.

JOHN GARRETT SMITH, Respondent,

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**BRIEF OF AMICUS  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS**

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I. INTRODUCTION

Washington's Privacy Act, RCW 9.73, and the exceptions provided therein, balance crucial privacy and public safety interests. The Washington State Association of Municipal Attorneys (WSAMA) represents prosecuting attorneys throughout the state who are responsible for implementing the balance between privacy and public safety called for in the Privacy Act. This brief of *amicus curiae* is provided by WSAMA for the purpose of facilitating this Court's interpretation of the Privacy Act, and the resulting balance between privacy and public safety.

In this matter, the Court of Appeals has misapplied the statute and relevant case law. The result is a decision that tilts the balance so far towards privacy that public safety is sacrificed through the shielding of criminal conduct. But there is no support in the relevant case law, statutory language, or legislative history for the Court of Appeals' conclusion. For these reasons, this Court should vacate the decision of the Court of Appeals and affirm the decision of the trial court. That decision will ensure that Washington's Privacy Act is properly interpreted and implemented. In so doing, this Court will protect vital public interests in both privacy and public safety.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys is a

nonprofit Washington corporation that provides education and training in the area of municipal and criminal law to attorneys who represent cities and towns and prosecute misdemeanor crime. The Washington State Association of Municipal Attorneys also works to advance knowledge of criminal law to assist judicial and legislative decision-making that impacts effective law enforcement and prosecution of crime for the benefit of residents throughout the State of Washington. This brief of *amicus curiae* is provided by WSAMA in furtherance of these purposes.

Each year WSAMA provides criminal law training to prosecuting attorneys. The Washington State Association of Municipal Attorneys submits this brief of *amicus curiae* to request that this Court vacate the Court of Appeals' decision, and reinstate Mr. Smith's conviction as held by the trial court.

### III. STATEMENT OF FACTS

The Washington State Association of Municipal Attorneys adopts the Statement of Facts provided by the State of Washington in its Supplemental Brief. *Supplemental Brief of Petitioner*, 1-8.

### IV. ARGUMENT

The Court of Appeals' decision stretches Washington's Privacy Act beyond its language or intent to conclude that the recording in question must be suppressed because it captured a private conversation without Mr.

Smith's consent. Under the Privacy Act, it is "unlawful for any individual... to... record any private conversation, by any device... designed to record or transmit such conversation... without first obtaining the consent of all the persons engaged in the conversation." [RCW 9.73.030\(1\)\(b\)](#). There is, however, an exception to this general prohibition for "conversations... which convey threats of... bodily harm." [RCW 9.73.030\(2\)\(b\)](#). Threats of bodily harm "may be recorded with the consent of one party to the conversation." [RCW 9.73.030\(b\)](#).

There is nothing in the language of the statute or the facts of the case to protect indiscriminate shouting as private. Likewise, neither the statute's language or legislative history infer that domestic violence offenders should be rewarded for recording their criminal acts, regardless of whether such recording was intentional or inadvertent. Mr. Smith's conviction should be reinstated.

**A. The Privacy Act protects private conversations: not anything more.**

A conversation is "private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." [State v. Kipp](#), 179 Wn. 2d 718, 729, 317 P.3d 1029 (2014); [State v. Townsend](#), 147 Wn. 2d 666, 673, 57 P.3d 255 (2002). This two-step test is virtually identical to that created by the U.S. Supreme Court in [Katz v. U.S.](#),

which remains a fundamental component of privacy law. 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Here, the Court of Appeals superficially found a subjective and reasonable manifestation of an expectation of privacy because “the dispute did not occur until Williams left” and “occurred between two married persons in the privacy of their home.” *State v. Smith*, 196 Wn. App. 224, 235, ¶ 25, 382 P.3d 721 (2016). But more than a perfunctory conclusion is warranted. A thorough and accurate assessment of the *Kipp* factors is required by this Court. *See, e.g., State v. Faford*, 128 Wn. 2d 476, 484, 910 P.2d 447 (1996) (calling for “case-by-case consideration of *all* the surrounding facts (emphasis added)).<sup>1</sup>

“Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party.” *State v. Kipp*, 179 Wn. 2d at 729, ¶ 18. Unlike the Court of Appeals’ perfunctory conclusion, a more thorough and accurate analysis reveals that the totality of the *Kipp* factors weighs against any privacy

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<sup>1</sup> “A decision by this court is binding on all lower courts in the state.” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn. 2d 566, 578, 146 P.3d 423 (2006); *State v. Mathers*, 193 Wn. App. 913, 923, 376 P.3d 1163 (2016).

interest in this matter.<sup>2</sup>

1. The duration and subject matter of the recording do not demonstrate an expectation of privacy.

The Court of Appeals describes the event as a “domestic dispute in the privacy of their own home.” *State v. Smith*, 196 Wn. App. at 235, ¶ 24. This does little to identify any subject matter. Is the subject matter of the domestic dispute the location of Mr. Smith’s phone? Is the subject matter of the dispute the injuries of Ms. Smith? Is the subject matter of the dispute the consequences of Mr. Smith’s actions? Is the subject matter of the dispute who or what “Zoie” means? *See* CP 78-81. The subject matter of the dispute could be any, or none, of these things.

Whether the subject matter is one of these things, or something else altogether, nothing in the content suggests a private subject matter. There is nothing inherently private about the injuries of Ms. Smith, or the location of Mr. Smith’s phone, or the meaning of “Zoie.” Nor does the recording include subject matters that *are* inherently private, like medical conditions,

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<sup>2</sup> The third *Kipp* factor, the relationship of the nonconsenting party to the consenting party, does indicate an expectation of privacy in this instance because Mr. and Ms. Smith are married. *See Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). But the marital relationship between the parties is not a blanket protection for *everything* said within a marital relationship. *See, State v. Webb*, 64 Wn. App. 480, 486-87, 824 P.2d 1257 (1992) (discussing multiple cases limiting the privacy of marital communications).

family planning and parenting, or financial information.<sup>3</sup>

Additionally, there are no indicia that the parties intended to create privacy in any subject not inherently private. It is axiomatic that a speaker expecting privacy on banal subjects manifests some expectation of privacy. *See, e.g., State v. Townsend*, 147 Wn. 2d 666, 674, 57 P.3d 255 (2002) (wherein one party’s “intent is made manifest by Townsend’s message to Amber to not ‘tell anyone about us’”). When we ask others to keep our confidences, we call them secrets. When such statements are shared, we call it gossip. Affirmative indicia of a privacy expectation are pervasive in our culture and language. Yet the recording in question does not include a request for confidence, a statement that the speaker intends confidentiality, or any indicia of a privacy expectation.

Finally, even the duration of the recording does not support the Court of Appeals’ rejection of the facts found by the trial court. Lasting only a few minutes, the duration of the recording does not manifest an expectation of privacy. *See, e.g., State v. Clark*, 129 Wn. 2d 211, 225, 916 P.2d 384 (1996) (finding no expectation of privacy in a “very abbreviated”

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<sup>3</sup> *See, State v. Athan*, 160 Wn. 2d 354, 367-68, ¶ 16, 158 P.3d 27 (2007) (acknowledging an important privacy expectation in medical information); *State v. Maxon*, 110 Wn. 2d 564, 570, 756 P.2d 1297 (1988) (recognizing a right to privacy in familial information); and *State v. Hinton*, 179 Wn. 2d 862, 874, 319 P.3d 9 (2014) (addressing the privacy expectation in financial information).

conversation). This Court should vacate the decision of the Court of Appeals and reinstate Mr. Smith's conviction.

2. The location at which the recording was made, and the potential presence of third parties, do not demonstrate an expectation of privacy.

It is common sense that as the volume increases, the expectation of privacy decreases.<sup>4</sup> Likewise, the expectation of privacy decreases as the proximity of neighbors increases.<sup>5</sup> Despite this, the Court of Appeals does not point to any evidence in the record on appeal that neighbors or passersby were not within earshot of Mr. Smith's raucous conduct. This missing analysis is crucial: "what a person knowingly exposes to the public, *even in his own home or office*, is not a subject... of protection." *Katz*, 389 U.S. at 351 (emphasis added).

There is no credulous argument that the screaming, shouting, and chaos captured on Mr. Smith's voicemail was not "knowingly exposed to the public" where there is no evidence that it was inaudible to neighbors and passersby. Moreover, Mr. and Ms. Smith had actual knowledge that a third

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<sup>4</sup> See, e.g., *State v. White*, 18 Or. App. 352, 525 P.2d 188 (1974); *State v. Shellenbarger*, 140 Idaho 185, 90 P.3d 935 (2004), attached in Appendix A.

<sup>5</sup> See, e.g., Enrique Garcia Juan Herrero, *Perceived Neighborhood Social Disorder and Attitudes Toward Reporting Domestic Violence Against Women*, *Journal of Interpersonal Violence*, Vol. 22, Issue 6 (2007).

party, Ms. Williams, could return to the residence, and interrupt the recording, at any time. *See* CP 23 where Ms. Williams left the residence because of the tension between Mr. and Ms. Smith and went to the gym, but returned to the residence prior to completing any exercise. This Court should conclude that Mr. Smith had no reasonable expectation of privacy in the recorded events that would place them within the purview of the Privacy Act.

**B. The purpose of the Privacy Act, and the amendments thereto, is not the protection of criminal conduct.**

The Court of Appeals completely evades a critical issue: stating that “whether John inadvertently or purposely recorded himself is beside the point; the statute requires no specific mental state for a person to improperly record a conversation.” *State v. Smith*, 196 Wn. App. at 237, ¶ 30.<sup>6</sup> The Court of Appeals ignores repeated judicial analysis of the element of consent, allowing Mr. Smith to use the Privacy Act as a shield against his own criminal conduct. Similarly, the Court of Appeals ignores the lack of any legislative history demonstrating an intent to facilitate the shielding of

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<sup>6</sup> The Court of Appeals relies on *Lewis v. Dept. of Licensing* and *Haymond v. Dept. of Licensing* to assert that the Privacy Act requires no mental state, but neither matter is applicable to this proceeding. In *Lewis*, the officer violated a statute requiring an affirmative statement that the conversation was being recorded. *Lewis v. Dept. of Licensing*, 157 Wn. 2d 446, 469, 139 P. 3d 1078 (2006). There is no affirmative requirement in this matter. Likewise, in *Haymond* the Court affirmed the admission of a recording made without consent. *Haymond v. Dept. of Licensing*, 73 Wn. App. 758, 872 P. 3d 61 (1994). Mr. Smith consented to the recording in this matter.

criminal conduct. Instead, the very purpose of the exemption is to shield the victim of such conduct by identifying threats as beyond the scope of a “conversation.” The Supreme Court should reverse the decision of the Court of Appeals because it contradicts relevant case law and thwarts the very purpose of the exceptions created by [RCW 9.73.030\(2\)\(b\)](#).

1. Mr. Smiths’ voluntary conduct is inherently consent to the recording.

Recording a threat of bodily harm does not violate the Privacy Act if any party to the conversation consents to the recording thereof. [RCW 9.73.030\(2\)\(b\)](#). It is undisputed the Mr. Smith voluntarily placed a call to his voicemail-enabled iPhone. Assuming *arguendo* that the recording in question captured a conversation, it is undisputed that Mr. Smith was a party to that conversation. It is self-evident that a party who causes a recording to be made has consented to the recording.

This is not a case where a third party made a recording. Nor is this a case involving a device not known to record. Yet such instances would be viable examples of inadvertent recording. For example, media coverage of an Arkansas first-degree murder case has centered around Amazon’s refusal to divulge recordings made by the [Defendant’s Echo device](#).<sup>7</sup> Similarly, [Samsung](#) provides the following warning in its fine print:

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<sup>7</sup> Amy B. Wang, *Can Alexa Help Solve a Murder? Police think so – but Amazon won’t give up her data*, Washington Post, December 28, 2016, at [https://www.washingtonpost.com/news/the-switch/wp/2016/12/28/can-alexa-help-solve-a-murder-police-think-so-but-amazon-wont-give-up-her-data/?utm\\_term=.110fabee8a83](https://www.washingtonpost.com/news/the-switch/wp/2016/12/28/can-alexa-help-solve-a-murder-police-think-so-but-amazon-wont-give-up-her-data/?utm_term=.110fabee8a83).

Please be aware that if your spoken words include personal or other sensitive information, that information will be among the data captured and transmitted to a third party through your use of Voice Recognition.<sup>8</sup>

These devices are distinguishable because they created recordings even though their users had no knowledge of their recording capabilities. In this instance, Mr. Smith was not using an Amazon Echo. Nor was he using a Samsung television. Mr. Smith was using an iPhone. Not only that, but it was Mr. Smith who enabled the iPhone's voicemail capabilities.

Use of a device known to record has been identified as consent. *State v. Townsend*, 105 Wn. App. 622, 629, 20 P.3d 1027 (2001). The consent in *Townsend* is indistinguishable from Mr. Smith's consent when he used a device he knew to have recording features. Mr. Smith consented to the recording. Consequently, the Court of Appeals erred in ruling that Mr. Smith's conduct was "beside the point."<sup>9</sup>

2. The Legislature's 1977 amendment creating the exemption for recorded threats of bodily harm is meant to protect victims, not shield criminal conduct.

Like *Townsend*, the Court of Appeals also ignored the very purpose

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<sup>8</sup> Chris Matyszczyk, *Samsung's Warning: Our Smart TV's record your living room chatter*, CNet, February 8, 2015, at <https://www.cnet.com/news/samsungs-warning-our-smart-tvs-record-your-living-room-chatter/>.

<sup>9</sup> Notably, Amicus American Civil Liberties Union of Washington is in agreement with the State of Washington on the admissibility of Mr. Smith's recording, despite historically taking opposing views in criminal cases. *Brief of Amicus Curiae American Civil Liberties Union of Washington*, p. 14-15.

of the exception in [RCW 9.73.030\(2\)\(b\)](#). In 1977, the legislature added an exception to the Privacy Act’s protection of unconsented recordings. [Senate Bill No. 2419](#).<sup>10</sup> The legislature provided that recordings of threats only required the consent of one party. [RCW 9.73.030\(2\)\(b\)](#). This exception serves an important public safety purpose: protecting victims.

The Court of Appeals’ dismissal of *State v. Smith* as *sui generis* ignores this public safety purpose and threatens the protection offered by [RCW 9.73.030\(2\)\(b\)](#) to future victims. In 1975, this Court was “convinced that the events here involved do not comprise ‘private conversation’ within the meaning of the statute. *State v. Smith*, 85 Wn. 2d 840, 846, 540 P.2d 424 (1975). Essentially, this Court could not conceive of a legislative intent to shield criminal conduct. The legislature clearly agreed with the Court that “private conversation” does not include certain forms of speech, including threats of bodily harm.

“When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute.” *State v. Roggenkamp*, 153 Wn. 2d 614, 629, 106 P.3d 196 (2005). In 1977, the Legislature’s creation of the exception in [RCW 9.73.030\(2\)\(b\)](#) affirmed the definition of “private conversation” in *State v. Smith*. The Court of Appeals erred by not

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<sup>10</sup>Available at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1977ex1c363.pdf>

recognizing the important public safety purpose of *State v. Smith*, or the legislature's affirmation thereof. Consequently, this Court should reverse the decision of the Court of Appeals and reinstate the trial court's conviction.

V. CONCLUSION

The Washington State Association of Municipal Attorneys is a nonprofit organization that provides criminal law training to prosecuting attorneys, which includes the relationship between criminal prosecution and Washington's Privacy Act. This brief of *amicus curiae* is provided by WSAMA in furtherance of this purpose. Here, the Court of Appeals has omitted necessary *Kipp* analysis regarding a private conversation, and stretched the Privacy Act so far as to destroy its scope and public safety purpose. For these reasons, this Court should vacate the decision of the Court of Appeals and affirm the decision of the trial court.

Signed this \_\_\_\_ day of \_\_\_\_\_, 2017.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the below date, I sent a copy of this document via electronic mail (where e-mail addresses are indicated) as well as via U.S. Mail, postage pre-paid, transmitted to the following:

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## Appendix A

18 Or.App. 352  
Court of Appeals of Oregon.

STATE of Oregon, Appellant,  
v.  
Larry Gordon WHITE, Respondent.

Argued and Submitted July 19, 1974.

|  
Decided Aug. 12, 1974.

The Circuit Court, Multnomah County, William M. Dale, J., ordered marijuana taken as evidence in warrantless arrest of defendant and warrantless search of his home suppressed as evidence, and State appealed. The Court of Appeals, Tanzer, J., held that observation by police officers while standing on front porch of defendant's house of easily disposable bag of marijuana in plain view and in possession of defendant constituted exigent circumstances which justified a warrantless entry and seizure of contraband.

Reversed and remanded.

Fort, J., concurred specially and filed separate opinion.

West Headnotes (2)

[1] **Arrest**

🔑 Particular cases

**Searches and Seizures**

🔑 Scope, Conduct, and Duration of  
Warrantless Search

Particularly where defendant was broadcasting music to neighborhood at tremendous volume from house, police officers' action in approaching house by way of front porch did not violate defendant's reasonable right of privacy. [U.S.C.A.Const. Amend. 4.](#)

[2 Cases that cite this headnote](#)

[2] **Controlled Substances**

🔑 Exigent circumstances

Observation by police officers while standing on front porch of defendant's house of bag of marijuana, in plain view, which was easily disposable and in possession of defendant constituted exigent circumstances which justified warrantless entry of defendant's house and seizure of the contraband. [U.S.C.A.Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

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\*353 Albert J. Bannon, Portland, argued the cause and filed the brief for respondent.

Before SCHWAB, C.J., and FORT and TANZER, JJ.

**Opinion**

TANZER, Judge.

This is an appeal by the state from an order suppressing marijuana taken as evidence in a warrantless arrest of defendant and in a warrantless search of his home.

On November 8, 1973, Officer Trummer of the Portland Police Bureau Narcotics Detail received an anonymous phone call advising him that the residents of 2043 Pine were possibly dealing in drugs. Around midnight Officers Trummer and Baxter began observing the defendant's house. Over a half-hour period the officers observed people leaving and a stereo playing so loudly as to be heard over two blocks away. An undercover officer arrived and he and Baxter walked to the front door, intending to offer to purchase some drugs. While on the front porch approaching the door, the officers necessarily passed a window. There was a six-inch vertical gap between the window curtains. Through the gap the officers saw on a lamp table a plastic bag containing loose green material which resembled and later proved to be a pound of marijuana.

The two officers moved to the front door. Through the front door window they saw a table on which were scales, small plastic bags, and at least two pounds of apparent

marijuana. A large fire burned in the fireplace. The officers knocked on the door for over two minutes but could not be heard due to the loudness of \*354 the stereo. The volume was so high that the door trembled. They entered the house, arrested defendant and seized the evidence in plain view.

The defendant contended successfully in the trial court that the police violated his Fourth Amendment right of privacy by going upon his front porch. The observation and seizure of the marijuana, defendant contends, were therefore unlawful.

The lawfulness of the officers' presence upon defendant's front porch must be determined in light of the validity of defendant's claim of an expectation of privacy there. The claim of privacy is measured against the twofold test enunciated by Justice Harlan in [Katz v. United States](#), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), adopted by this court in [State v. Stanton](#), 7 Or.App. 286, 490 P.2d 1274 (1971), and applied in [State v. Corbett](#), 15 Or.App. 470, 516 P.2d 487, rev. den. (1974):

“\* \* \* (T)here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’. \* \* \*’ 389 U.S. at 361, 88 S.Ct. at 516.’

[1] Under these circumstances, any expectation the defendant had of privacy regarding his front porch could not be regarded \*\*190 as reasonable. As we held in [Corbett](#), the area of public approach to a house is less reasonably expected to be private than other areas. Particularly in this case, with music being broadcast to the neighborhood at tremendous volume, it would be unreasonable not to expect somebody to approach the house by way of the front porch.

Justice Harlan's concurring statement of the \*355 rule in [Katz](#) goes on to explain how observations of property in plain view are to be regarded:

‘A man's home is, for most purposes, a place where he expects privacy, but objects, activities or statements he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited.’ 389 U.S. at 361, 88 S.Ct. at 516.

Such observations are therefore available as the basis for probable cause. [State v. Brown](#), 1 Or.App. 322, 461 P.2d 836, 838 (1969).

[2] The observation in plain view of easily disposable substances in the possession of the defendant constitutes exigent circumstances justifying a warrantless entry and seizure of contraband. [State v. Drummond](#), 6 Or.App. 558, 489 P.2d 958 (1971); [State v. Huddleston](#), 5 Or.App. 9, 480 P.2d 454, rev. den. (1971); [State v. Robbins](#), 3 Or.App. 472, 474 P.2d 772 (1970).

Reversed and remanded.

FORT, Judge (specially concurring).

I concur in the result. I believe that the police had reasonable cause, because of the totality of the circumstances relating to the extraordinary volume of noise disturbance of the surrounding area, to approach the private home to investigate the reason therefor. Here such activity within the home clearly extended into public areas and, indeed, unreasonably violated the reasonable expectations of privacy of other persons in private premises over a two-block area at a late hour of the night or early morning. Thus, entry onto the front porch was, whatever the declared purpose of the police, reasonable. Upon such entry, the extreme volume of the noise was such that prolonged \*356 efforts to attract a response from persons within by the police, shouting and hammering on the door, went unheeded, and thus presumably unheard. Under such unusual and exigent circumstances, the entry into the house in the manner used here was no more unreasonable than had the police been drawn to the premises by signs of a dwelling on fire and entered under similar circumstances.

It has long been the rule that where there is probable cause to arrest a person, the fact that the police arrest him for the wrong reason, i.e., one for which probable cause does not exist, does not invalidate the arrest nor a reasonable search incident thereto. [State v. Cloman](#), 254 Or. 1, 12, 456 P.2d 67 (1969); [State v. Somfleth](#), 8 Or.App. 171, 492 P.2d 808, Sup.Ct. review denied (1972). Thus, the entry onto the front porch and also into the dwelling were lawful on these unusual facts. Following the entry into the home, the contraband was in plain view and thus its seizure was valid.

Accordingly, I do not find it necessary to decide whether the opinion of the majority is consistent with the rationale of *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1972) and cases therein discussed. Nor do I understand that, as the court seems to imply, a warrantless entry into and search of a private home is

to be measured by the same standards as those governing the seizure of evidence in a motor vehicle. See, *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 2537, 37 L.Ed.2d 706 (1973).

**All Citations**

18 Or.App. 352, 525 P.2d 188

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140 Idaho 185  
Court of Appeals of Idaho.

STATE of Idaho, Plaintiff–Respondent,

v.

Richard SHELLNBARGER, Defendant–Appellant.

No. 29561.

|

May 6, 2004.

### Synopsis

**Background:** Defendant pled guilty in the Fourth Judicial District Court, Elmore County, [Michael E. Wetherell, J.](#), to possession of methamphetamine. Defendant appealed denial of his motion to suppress.

**Holdings:** The Court of Appeals, [Perry, J.](#), held that:

[1] officers' arrest of defendant while he stood inside doorway of his motel room did not violate “public places only” condition in defendant's arrest warrant; and

[2] evidence indicated that police officers' arrest of defendant in open doorway of defendant's motel room did not exceed area beyond open doorway, and thus arrest did not constitute an impermissible invasion of defendant's right to privacy.

Affirmed.

West Headnotes (9)

#### [1] Arrest

🔑 Authority under warrant

Officers' arrest of defendant while he stood inside doorway of his motel room did not violate “public places only” condition in defendant's arrest warrant, where officers knocked on the door of motel room and identified themselves as police officers, defendant opened the door and spoke to the officers with apparent cooperation, defendant remained in the doorway while one officer confirmed warrants for defendant's arrest,

and other officer stepped into the doorway to make the arrest. [U.S.C.A. Const.Amend. 4.](#)

[1 Cases that cite this headnote](#)

#### [2] Criminal Law

🔑 Illegally obtained evidence

#### Criminal Law

🔑 Evidence wrongfully obtained

On appeal from trial court's order resolving motion to suppress evidence, Court of Appeals accepts the trial court's findings of fact which are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found.

[Cases that cite this headnote](#)

#### [3] Criminal Law

🔑 Trial judge as sole arbiter of credibility

At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.

[Cases that cite this headnote](#)

#### [4] Arrest

🔑 Intrusion or Entry to Arrest

Generally, the police may not enter a suspect's home to make an arrest without a warrant or consent. [U.S.C.A. Const.Amend. 4.](#)

[Cases that cite this headnote](#)

#### [5] Searches and Seizures

🔑 Persons, Places and Things Protected

Fourth Amendment protection against unreasonable searches and seizures in a defendant's home extends to temporary homes such as motel rooms. [U.S.C.A. Const.Amend. 4.](#)

[Cases that cite this headnote](#)

#### [6] Arrest

🔑 Authority under warrant

While police have broad power in executing an arrest warrant, this power may be restricted by the judge issuing the warrant, who may establish conditions under which the warrant may be executed. [U.S.C.A. Const.Amend. 4](#).

[Cases that cite this headnote](#)

**[7] Arrest**

**🔑 Authority under warrant**

Limiting execution of an arrest warrant to any public place may be accomplished by marking such limitation on the face of the warrant. [U.S.C.A. Const.Amend. 4](#).

[1 Cases that cite this headnote](#)

**[8] Arrest**

**🔑 Authority under warrant**

Execution of an arrest warrant with disregard for the public place only limitation is equivalent to a warrantless entry, which is prohibited. [U.S.C.A. Const.Amend. 4](#).

[1 Cases that cite this headnote](#)

**[9] Arrest**

**🔑 Arrest Without Arrest Warrant**

Evidence indicated that police officers' arrest of defendant in open doorway of defendant's motel room did not exceed area beyond doorway, and thus arrest did not constitute an impermissible invasion of defendant's right to privacy, where officers took only one step inside the doorway, informed defendant that he was under arrest, placed him in handcuffs, and obtained defendant's consent check the bathroom for other persons. [U.S.C.A. Const.Amend. 4](#).

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*\*936 \*186 Molly J. Huskey**, State Appellate Public Defender; Sara B. Thomas, Chief Appellate Unit, Boise; Heidi K. Koonce, Legal Aid Clinic, Moscow, for appellant. Heidi K. Koonce, Legal Intern, argued.

Hon. [Lawrence G. Wasden](#), Attorney General; Kristina Marie Schindele, Deputy Attorney General, Boise, for respondent. Kristina Marie Schindele argued.

**Opinion**

**PERRY**, Judge.

Richard Shellenbarger appeals from the judgment of conviction entered by the district court after he conditionally pled guilty to possession of methamphetamine. We affirm.

**I.**

**FACTS AND PROCEDURE**

During the early morning hours of November 5, 2002, a police officer on patrol noticed a blue van parked at an odd angle in a motel parking lot as if the van had been abandoned. The officer checked the license plate and discovered that the plate was registered to a black Mazda pickup owned by Shellenbarger. The officer became concerned that the van, displaying fictitious plates, might be stolen. The officer discovered also that Shellenbarger was wanted on two Ada County warrants for a probation violation and failure to appear. The officer informed a fellow officer about the situation and both went to the motel to investigate.

Observing that the van was parked directly in front of a particular motel room with lights on inside, the officers knocked on the door. Shellenbarger, who was inside the room, came to the door and asked who was there. The officers responded that they were police. Shellenbarger opened the door and was told that the officers were concerned that the van might be stolen. Shellenbarger informed them that he was the van's owner and, upon request for identification, provided his driver's license. During the contact, the officers stood outside the door while Shellenbarger **\*\*937 \*187** stood inside the open doorway, two to three feet from the officers.

After confirming Shellenbarger's identity, one officer ran a status check and confirmed the two warrants for Shellenbarger's arrest. Although the warrants were restricted to arrest in public places only, this was not made known to the officer at that time. Upon confirmation of

the warrant, the other officer stepped into the doorway, informed Shellenbarger that he was under arrest, and placed him in handcuffs. Shellenbarger told the officers that no one else was in the room and consented to a check of the bathroom to ensure that no one was there. While checking the bathroom, officers observed drug paraphernalia and methamphetamine.

Shellenbarger was charged with possession of methamphetamine. I.C. § 37-2732(c)(1). Prior to trial, he filed a motion to suppress, claiming that the arrest was illegal on the grounds that, although unknown to the officers at the time, the warrants were limited to execution in any public place. Shellenbarger argued that officers failed to comply with the restriction on the warrants because the doorway to his motel room was not a public place. The motion to suppress was denied. Shellenbarger conditionally pled guilty, reserving the right to appeal the denial of his suppression motion. The district court entered a judgment of conviction and sentenced Shellenbarger to a seven-year term of imprisonment, with two years fixed. Shellenbarger's sentence was suspended, and he was placed on probation. On appeal, Shellenbarger argues that the district court erred when it denied his motion to suppress.

## II.

### ANALYSIS

[1] Shellenbarger contends that the evidence discovered in the motel room should have been suppressed. He argues that the police violated the public place only conditions placed upon the warrants when they arrested him in the motel room doorway, thereby invalidating the subsequent search. The state asserts that Shellenbarger voluntarily exposed himself to a public place when he opened the door and remained in the doorway during his encounter with the officers.

[2] [3] The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App.1996). At a suppression hearing, the power to assess the credibility of witnesses,

resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct.App.1999).

[4] [5] The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. Generally, the police may not enter a suspect's home to make an arrest without a warrant or consent. *State v. Christiansen*, 119 Idaho 841, 843, 810 P.2d 1127, 1129 (Ct.App.1990). Fourth Amendment protections extend to temporary homes such as motel rooms. *State v. Hall*, 132 Idaho 751, 753, 979 P.2d 624, 626 (1999).

[6] [7] [8] While police have broad power in executing an arrest warrant, this power may be restricted by the issuing judge, who may establish conditions under which the warrant may be executed. *Id.* at 753, 979 P.2d at 626. Limiting execution of the warrant to any public place may be accomplished by marking such limitation on the face of the warrant. *Id.* Execution of an arrest warrant with disregard for the public place only limitation is equivalent to a warrantless entry, which is prohibited. *Id.* at 754, 979 P.2d at 627.

The United States Supreme Court has held that a person standing inside the open doorway of a house is as exposed to public view, speech, hearing, and touch as if standing completely outside the house. *See United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300, 305 (1976). In *Santana*, officers possessed probable cause to believe that Santana had sold illegal \*\*938 \*188 drugs. They drove to Santana's house and saw her standing directly in the doorway. The officers exited their vehicle and shouted "police" as they approached the house. Santana retreated into the vestibule and dropped packets containing heroine onto the floor. Officers followed her into the home, made a warrantless arrest, and discovered marked drug purchase money in her pockets. Santana's motion to suppress the drugs and money was granted. On appeal, the Supreme Court reversed. Stating that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment, the Court held Santana had no expectation of privacy while standing in the open doorway and was considered to be in a public place. *Id.*; see also *State v. Wren*, 115 Idaho 618, 623, 768

P.2d 1351, 1356 (Ct.App.1989) (if person standing in partially obscured porch remains visible from street, alley, or adjacent property, a reasonable expectation of privacy does not exist and porch will be treated as a public place).

In this case, Shellenbarger was standing in the open doorway of the motel, two to three feet from the officers.<sup>1</sup> Under *Santana*, Shellenbarger was in a public place. However, Shellenbarger contends that, when a person opens a door in response to police-initiated contact, that person cannot be said to have voluntarily entered into a public place. Citing *Christiansen*, Shellenbarger contends that he was therefore not subject to arrest under the warrants.

In *Christiansen*, this Court was asked to decide whether a warrantless arrest is invalid when a suspect leaves the privacy of his residence in response to police knocking at the door, attempting to break in the door, and commanding the suspect to exit. The Court held that the suspect, in that situation, came out of the home as a result of police compulsion, rendering the warrantless arrest invalid. *Christiansen*, 119 Idaho at 844, 810 P.2d at 1130.

The present case differs significantly from the facts in *Christiansen*. Here, there was no police compulsion. The officers knocked on the door and identified themselves as police. Shellenbarger opened the door and spoke to the officers with apparent cooperation. He remained in the doorway while one officer took his driver's license to confirm the warrants. The officers stepped into the doorway to make the arrest. Thus, Shellenbarger's reliance on *Christiansen* is misplaced. Shellenbarger has not shown that he was compelled to enter the doorway.

Even when law enforcement officers use trickery to lure a wanted individual from a private residence into a public place, leaving the residence has been considered voluntary and the individual's subsequent arrest held to be valid. See *State v. Bentley*, 132 Idaho 497, 499–500, 975 P.2d 785, 787–88 (1999). In *Bentley*, officers knew Bentley had an outstanding misdemeanor warrant authorizing his arrest in a public place only. To induce Bentley to leave his house, officers knocked on the door and asked his mother if they could talk to him. When he came to the door, the officers asked Bentley to get his vehicle registration out of his car because it had been cancelled. After reluctantly going outside, Bentley was arrested. During a search

pursuant to the arrest, drugs were found in his pocket. Bentley was charged with drug offenses and filed a motion to suppress, challenging the validity of his arrest. The motion was denied. On appeal, the Idaho Supreme Court affirmed, concluding that Bentley was not compelled to leave his home and voluntarily did so. The Court held that the subsequent arrest in his driveway was valid.

In this case, as previously stated, officers knocked at Shellenbarger's motel room door and identified themselves as police. Without compulsion and not in response to trickery, \*\*939 \*189 Shellenbarger voluntarily opened the door and spoke with the officers while standing in the doorway. Thus, Shellenbarger's claim that he involuntarily entered a public place is without merit. Furthermore, other jurisdictions addressing the issue have concluded that officer-initiated doorway arrests in similar circumstances, and in warrantless cases, are valid. See *McKinnon v. Carr*, 103 F.3d 934, 935–36 (10th Cir.1996) (arrest valid where police knocked, identified themselves as police, neither displayed nor threatened violence, and arrested suspect in doorway when suspect opened door); *United States v. Vaneaton*, 49 F.3d 1423, 1425–27 (9th Cir.1995) (doorway arrest valid where uniformed police knocked at motel door, suspect opened curtain to look at officers, and voluntarily opened door); *United States v. Botero*, 589 F.2d 430, 432–33 (9th Cir.1978) (arrest valid where police knocked, suspect answered door, and police immediately arrested suspect in doorway); *People v. Burns*, 200 Colo. 387, 615 P.2d 686, 687–89 (1980) (doorway arrest valid where officers knocked, identified themselves as police and arrested suspect when he opened the door); *Byrd v. State*, 481 So.2d 468, 469–72 (Fla.1985) (doorway arrest valid where police knocked, identified themselves as police, and arrested suspect when he voluntarily answered door and stepped back to allow police entry); *People v. Morgan*, 113 Ill.App.3d 543, 69 Ill.Dec. 590, 447 N.E.2d 1025, 1026–28 (1983) (doorway arrest valid where suspect was told police wanted to speak with him and was arrested when he voluntarily came to the door).

[9] Finally, Shellenbarger claims that the Fourth Amendment prohibited the officers from stepping over the threshold to make the arrest. He argues that the police violated Shellenbarger's right to privacy in a way similar to the circumstances in *State v. Peterson*, 108 Idaho 463, 700 P.2d 85 (Ct.App.1985). In *Peterson*, several law enforcement officers, possessing a warrant for Peterson's

arrest, knocked on the door. When Peterson answered, they informed him of the warrant and asked permission to enter. Peterson responded that they could enter only if they had a search warrant. The officers entered without a search warrant, read the warrant for Peterson's arrest, made a protective sweep, and eventually found cocaine. Peterson's motion to suppress was denied. On appeal, the Court held that entry into Peterson's house, without a search warrant and when he could have easily been arrested on his doorstep, violated his Fourth Amendment rights. However, the Court's decision was based on its conclusion that, where there is no impediment to making an arrest in a doorway and the arrestee does not attempt to retreat into the house, officers may not intrude into a house over the objection of the arrestee simply to complete the arrest where they can more fully observe the interior of the house. *Peterson*, 108 Idaho at 465, 700 P.2d at 87.

Under the facts of the present case, *Peterson* is not applicable. The Court's focus in *Peterson* was on its concern with officers delaying an arrest in order to position themselves inside a home for a better look inside. In this case, the officers took only one step inside the doorway, informed Shellenbarger that he was under arrest, placed him in handcuffs, and asked permission to check the bathroom for other persons. Shellenbarger consented to the search. Shellenbarger has not shown, and

the testimony does not indicate, that the officers arrested him in an area beyond the open doorway. Shellenbarger has failed to demonstrate that his arrest was unlawfully made in violation of the restrictions on warrants for his arrest or in violation of the Fourth Amendment. Additionally, he has not shown that his consent to the subsequent search was tainted or that the search was invalid.

### III.

#### CONCLUSION

For the foregoing reasons, we conclude that Shellenbarger has failed to show that the district court erred when it denied his motion to suppress the evidence found after his arrest and pursuant to the subsequent consensual search. Shellenbarger's judgment of conviction is affirmed.

Chief Judge [LANSING](#) and Judge [GUTIERREZ](#) concur.

#### All Citations

140 Idaho 185, 90 P.3d 935

#### Footnotes

- 1 Shellenbarger claims that he was two to three feet inside the motel room. However, the record as to his position within the doorway is unclear. The officers testified that they were outside the door, two to three feet from Shellenbarger. If the officers were standing two feet from the threshold, Shellenbarger would have been either on the threshold or within a foot of the threshold. The arresting officer testified that he took one step into the doorway, placing him into the doorway a distance equal to half the length of the door. Regardless of whether Shellenbarger was on the threshold or two to three feet from the threshold, he was in the open doorway and, under *Santana*, was in a public place.