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No. 95707-0

THE SUPREME COURT OF WASHINGTON

SOLOMON MCLEMORE,

Petitioner/Defendant

v.

CITY OF SHORELINE,

Respondent/Plaintiff

SUPPLEMENTAL BRIEF OF PETITIONER
SOLOMON MCLEMORE

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1. INTRODUCTION

Solomon McLemore was found guilty of Obstructing a Law Enforcement Officer for attempting to exercise his rights under the 4th Amendment of the US Constitution and Article I, Section 7 of the Washington Constitution. McLemore refused to open the door to his home when police wanted to conduct a warrantless search under the community caretaking exception.

At the time of the search, there was no evidence that McLemore had committed any crimes; nor was there evidence that McLemore was armed or dangerous. At trial, no evidence was introduced that McLemore had done anything to prevent the officers from doing their job, beyond not unlocking a door that was already locked.

McLemore repeatedly moved for the Courts to dismiss the charges against him. Shoreline District Court, King County Superior Court, and the Washington State Court of Appeals have all denied this request, finding that “McLemore’s refusal to open the door” to his house for a warrantless search “was willful” and therefore obstructing, citing the decision in State v. Steen, 164 Wash. App. 789, 265 P.3d 901 (2011).

In Steen, the Division 2 Court of Appeals found that Steen could be found guilty for Obstructing because he did not exit a trailer with his hands up during a community caretaking search. The Court in Steen made

no meaningful 4th Amendment or Article I, Section 7 analysis as to Steen's privacy rights and found that because a driver of a car has to comply with an order to exit their car during a stop, so should a person in their home.

The issue with Steen and the rulings in this case, is that unlike a car, where the intrusion on a person's privacy right may be *de minimis*, a person has far greater privacy expectations in a home. Demanding a person to exit their home when they have not violated the law is not *de minimis*. Further, both the U.S. Supreme Court and the 9th Circuit Court of Appeals have repeatedly held that a person has no obligation to open the door or speak to police officers when they do not have a warrant.

For these reasons and as discussed below, McLemore respectfully requests the Washington State Supreme Court overturn the lower Courts' decisions and dismiss this case.

2. ASSIGNMENT OF ERROR

- A. Whether a person is guilty of obstructing for refusing to unlock a door to their home for an officer conducting a warrantless search?
- B. Whether there is any authority that would require a citizen to assist an officer conducting a warrantless search?
- C. Whether the Trial Court erred by denying the Knapstad motion and by preventing McLemore from presenting evidence of his defense?

3. STATEMENT OF THE CASE

On March 1, 2017, around 1:30 in the morning, Solomon McLemore was in a verbal argument with his girlfriend, Lisa Janson. Clerk's Papers (hereinafter "CP") 296-297, 320-21, 358, 454-455. At no point did the argument turn violent, nor did either party violate any laws. CP 308, 313, 380, 454-455. A passerby overheard the argument and called 911.

Shoreline officers reported to the verbal disturbance. CP 296, 320-321, 358. The officers heard a woman yell "You can't leave me out here", "I'm going to call 911 or call the police", and "I'm reconsidering our relationship." CP 297, 323, 360. The officers determined that the yelling was coming from an apartment above a drycleaner. CP 299-300.

The officers started knocking on the door, ringing the doorbell, announcing that they were Shoreline Police, and requesting that the occupants of the apartment come to the door. CP 302-303, 324, 327, 361. As soon as they started knocking, the argument ceased. *Id.* The officers estimated that they were knocking for about eight minutes. *Id.* The officers proceeded to use the public-address system for another eight minutes, telling the occupants of the apartment that they needed to come to the door and unlock the door, or they would break the door down; stating "open the fucking door". CP 304, 326, 364, 412, 436, 452. The officers then heard glass breaking two separate times. CP 305-306. Based on the breaking

glass, the officers determined that they had “exigent circumstances” to search the house and made the decision to break down the door. CP 306.

As the officers started using a hatchet to break down the door, McLemore contacted the officers through the door. CP 329. McLemore repeatedly told the officers that he did not have to let them in, that they were violating his civil rights, and that they needed a search warrant. CP 330-332, 369, 413-414, 432. The officers eventually were able to breach the door with the aid of the Shoreline Fire Department and arrested McLemore for Obstructing. CP 308, 313, 339, 371, 380. After interviewing McLemore and his girlfriend Lisa Janson, the officers determined that no other crimes had been committed. CP 308, 313, 380.

There was no evidence that McLemore had done anything to prevent the officers from entering the home. CP 339, 382, 463. There was no evidence that McLemore barricaded the door, locked additional doors, hid from the officers, or added additional locks to the door. *Id.*

There was no evidence that McLemore prevented the other occupant of the apartment, Janson from cooperating with the officers or unlocking the door. CP in general. The City in its responses has continued to claim that McLemore “would not allow her to open the door or be presented visually to police.” CP 495-498. There was no evidence of this and in fact, the opposite is true. Janson testified that she went down on her own

accord and told the officers to leave. CP 453-461. She never testified that McLemore prevented her from answering the door or opening the door. *Id.* The City also attempted to place some emphasis on McLemore telling Janson to tell the officers she's all right. But there was no evidence that this was coerced or false. The only issues in this case is whether the officer's had legal authority to order McLemore to open the door and whether refusal of that order was obstructing.

McLemore filed a motion to dismiss and argued that a person cannot be convicted of obstructing for exercising the constitutional right to be free of warrantless searches and refusing the order to open his door. The trial court denied the motion finding that "delay need to call Shoreline Fire for tools to break in the residence all make the community caretaking function an exception to 4th amendment privacy consideration." [sic] CP 138. The Court based the decision on State v. Steen, 164 Wn. App. 789 (2011).

The matter proceeded to trial and the court prohibited McLemore from making any reference to the officers not obtaining a search warrant or from arguing that the order to open the door was not a lawful order that McLemore was required to follow. CP 281-282, 413-414, 432. The jury returned a verdict of guilty, but not before questioning this very issue.

The Jury asked “Does a person have the legal obligation to follow the police instructions, in this case?” CP 43.

The matter was appealed to Superior Court RALJ. Judge Rosen affirmed the Shoreline District Court ruling and upheld the conviction. CP 533. McLemore filed a Motion for Discretionary Review to the Court of Appeals that was denied, holding that refusing to open a door during a warrantless search is obstructing. McLemore filed a Motion to Modify that was also denied. The Supreme Court granted review of these issues.

4. ARGUMENT

A. The Government cannot punish someone for attempting to exercise their constitutional rights by refusing to unlock a door to their home during a warrantless search

The issue in this case is whether a police officer has the authority to order a person to open a door to their home during a warrantless search and whether it is obstructing to refuse such an order. The case law is clear that no such authority exists. There is no law, statute or ordinance that creates a duty for a citizen to affirmatively assist police in a search. A citizen cannot interfere or intentionally do things to prevent the officers from doing their job, but there is no law that requires a citizen to do anything beyond staying out of the way.

Indeed, the law is clear that citizens have an affirmative constitutional right under the Fourth Amendment of the US Constitution and Article I,

Section 7 of the Washington Constitution not to assist the police in these types of circumstances. Allowing this case to proceed establishes a rule that punishes citizens attempting to exercise their Fourth Amendment and Article I, Section 7 rights.

The lower courts in this case have interpreted the ruling in State v. Steen to create such a duty, even though there is no law that supports this conclusion. State v. Steen, 164 Wash. App. 789, 802, 265 P.3d 901, 908 (2011), as amended (Dec. 20, 2011). The Court upheld Steen's conviction for Obstructing because he did not exit a trailer home with his hands up when ordered to do so by the police. *Id.* In support of its finding, the Steen Court cites State v. Contreras, 92 Wash. App. 307, 966 P.2d 915(1998), holding that refusing to exit a home was synonymous with refusing to exit a motor vehicle. Steen, 164 Wash. App. at 802.

In its decision, the Steen Court does no Fourth Amendment or Article I, Section 7 analysis as to what privacy rights a person has in their home and how an order to exit a home would infringe on those rights. This is in error, as it compares a driver's right of privacy stopped by an officer investigating an infraction or criminal activity to that of a person inside a home. They are far different and should be treated as such.

Washington Courts have long recognized that asking someone to exit a vehicle, especially upon suspicion of both criminal activity and danger to

responding officers, is a *de minimis* intrusion of a citizen's right to be free from arbitrary searches or seizures. See, e.g., State v. Kennedy, 107 Wash.2d 1, 9, 726 P.2d 445 (1986); State v. Mendez, 137 Wash.2d 208, 970 P.2d 722 (1999), adopting the federal holding in Pennsylvania v. Mimms, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The intrusion on a driver's right to privacy was found to be *de minimis* because the officer had already determined that the driver would be lawfully detained and the driver was being asked to expose to view very little more of his person than was already exposed. Id.

Thus, the officers in Contreras were well within the scope of their rights to demand that a driver exit their vehicle. However, McLemore, just like Steen, was not operating or sitting in a motor vehicle in a public right of way. Instead, he was in his home and had not committed any crimes.

The government's interference with McLemore's privacy rights were not *de minimis*. Requiring a person secure in their house to present themselves for inspection, without a warrant and without probable cause that they committed a crime, is far different than requesting a driver to exit a stopped car.

Cars do not share the same constitutional protections as a person's home. Cooper v. California, 386 U.S. 58, 59, 97 S.Ct. 788, 790, (1967).

“Although vehicles are ‘effects’ within the meaning of the Fourth Amendment, for purposes of the Fourth Amendment there is a constitutional difference between houses and cars.” Cady v. Dombrowsk, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527(1973) (internal quotations omitted). A person’s home is afforded far greater protection under both the 4th Amendment and Article I, section 7.

The right not to be disturbed in one's home by the police without authority of law is the bedrock principle upon which our search and seizure jurisprudence is grounded. The Fourth Amendment to the United States Constitution establishes the right of the people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” ... Article I, section 7 “differs from the Fourth Amendment in that it clearly recognizes an individual's right of privacy with no express limitations.” “Article I, section 7, does not use the words ‘reasonable’ or ‘unreasonable.’ Instead, it requires ‘authority of law’ before the State may pry into the private affairs of individuals.” These important constitutional protections cannot easily be brushed aside by representatives of the government.

State v. Schultz, 170 Wn.2d 746, 757–58, 248 P.3d 484, 489–90 (2011)(internal citation’s omitted).

Because Steen does not conduct any analysis pursuant to the 4th Amendment or Article I, Section 7, there are no Washington cases that address whether a person attempting to exercise these rights can be found guilty of Obstructing for not opening a door to their home during a search.

There is federal case law directly on point that is ignored by the decisions in this case.

In United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), the Ninth Circuit held that a citizen's "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing" because to hold otherwise would be to impose "an unfair and impermissible burden" on "the assertion of a constitutional right." *Id.* at 1351. The court explained:

When the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.

Id. at 1350-51 (citations omitted).

The U.S. Supreme Court has also taken the position that the government cannot punish people for attempting to exercise their constitutional rights in a warrantless search. See Camara v. Mun. Court of S.F., 387 U.S. 523, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding that the defendant could not constitutionally be convicted for refusing to allow warrantless inspection); District of Columbia v. Little, 339 U.S. 1, 7,

70 S. Ct. 468, 94 L.Ed. 599 (1950) (holding that the right to privacy “holds too high a place in our system of laws to” allow “criminal punishment on one who does nothing more” than make verbal protests and refuse to unlock her door); Kentucky v. King, 563 U.S. 452, 469–70, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865 (2011), (“When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak”).

These settled constitutional principles have been repeatedly applied to hold that citizens constitutionally cannot be convicted of obstruction for refusing police demands for entry. For example, in New Jersey v. Berlow, 284 N.J. Super. 356, 360-65, 665 A.2d 404 (1995), the court reversed a conviction for obstruction on Fourth Amendment grounds where the defendant had slammed and locked his door in response to the police’s demand for entry. (Here, by contrast, McLemore simply did not open his door and demanded the police obtain a warrant). The court expressly held that “[o]ne cannot be punished” for obstruction “for passively asserting” one’s Fourth Amendment right to deny entry. Id. at 408.

Other courts have persuasively held likewise. See, e.g., Ohio v. Howard, 75 Ohio App. 3d 760, 772, 600 N.E.2d 809 (1991) (“Appellant’s assertion of his constitutional right to refuse to consent to the entry and search cannot be a crime and cannot be used as evidence against him for purpose of establishing the elements of obstruction of justice. Courts disapprove of penalties imposed for exercising constitutional rights.”); Illinois v. Hilgenberg, 223 Ill. App. 3d 286, 293-294, 585 N.E.2d 180 (Ill. App. Ct. 1991) (holding that the defendant had a Fourth Amendment right to refuse entry requested by police and that “the assertion of that right does not constitute a crime”); Strange v. Tuscaloosa, 652 So.2d 773, 776 (Ala. Crim. App. 1994) (holding that defendant’s actions to prohibit a warrantless entry and search “cannot subject her to a criminal conviction”).

Courts in other states have repeatedly held that refusing to open a door in response to a police order is not obstruction. See, e.g., Beckom v. Georgia, 286 Ga. App. 38, 41-42, 648 S.E.2d 656 (2007) (holding that refusal to answer police’s knocking on door, ringing of doorbell, and phone calls is not obstruction); Adewale v. Whalen, 21 F. Supp. 2d 1006, 1011 n.4 (D. Minn. 1998) (holding that refusing to open the door for police is not obstruction); City of Columbus v. Michel, 55 Ohio App. 2d 46, 47-48, 378 N.E.2d 1077 (1978) (holding that refusing to open door in

response to police officer's repeated requests is not obstruction); Henderson v. County of L.A., No. 05-3019, 2009 WL 943891, at *5 (C.D. Cal. April 6, 2009) (acknowledging that refusal to cooperate with police, such as refusing to open door or allow entry, is not obstruction); Kansas v. Robinson-Bey, No. 98,614, 2008 WL 3916007, at *4-6 (Kan. Ct. App. Aug. 22, 2008) (holding that defendant's refusal to comply with police instructions to come out of a house was not obstruction); Ohio v. Prestel, No. 20822, 2005 WL 2403941, at *2 (Ohio Ct. App. Sept. 30, 2005) (“[R]efusing to answer the door when police knock and identify themselves and refusing to obey an officer's request for information does not constitute obstructi[on].”).

The rule should be at least as strong in Washington, given that the right of privacy embodied in Article I, Section 7 of the Washington Constitution is generally interpreted to be broader than the Fourth Amendment. See, e.g., State v. White, 97 Wash. 2d 92, 110-112, 640 P.2d 1061, 1070 (1982). When violations of both the federal and Washington constitutions are alleged, it is appropriate to examine the state constitutional claim first. Seattle v. Mesiani, 110 Wash.2d 454, 456, 755 P.2d 775 (1988). The federal constitution provides the minimum protection afforded citizens against unreasonable searches by the

government. State v. Chrisman, 100 Wash.2d 814, 817, 676 P.2d 419 (1984).

It is undeniable that McLemore had an expectation of privacy in his home under both the federal and Washington constitutions. McLemore attempted to exercise those rights during a warrantless search. While the search may have been justified, federal case law makes it clear that a person should not be punished for relying on that expectation of privacy when officers do not have a warrant.

The specific facts of this case show the absurdity of the holding in Steen. For eight minutes the officers banged on the door, demanding entry into the house when there was no exception to the warrant requirement. Then for an additional eight minutes, the officers demanded over a public announcement system that McLemore open his door and talk with them, to the point where they were using profanity and threatened to break the door down. And still, the officers did not have sufficient information to justify a warrantless entry. But then, the officers hear glass breaking, and in that very moment McLemore is now obstructing the officers by not immediately opening his door. Without a warrant or without statutory authority, how is a person of ordinary intelligence supposed to determine when their conduct becomes criminal?

B. There is no statutory authority that would require a citizen to assist an officer conducting a warrantless search

It would be consistent with other Washington case law regarding obstructing if this Court were to hold that a person is not guilty of obstructing for refusing entry into a house, where there is no warrant and there is no probable cause to arrest the person.

In Washington State, “our cases have consistently required conduct in order to establish obstruction of an officer.” State v. E.J.J., 183 Wn.2d 497, 502, 354 P.3d 815 (2015); State v. Williams, 171 Wn.2d 474, 485, 251 P.3d 877 (2011).

In E.J.J., the police kept telling E.J.J. to shut the door to the house. E.J.J., at 500. Instead, he kept opening the door and continued verbally abusing the police, who were 10-15 feet away. E.J.J., at 500. Multiple times the police walked back to the house and shut the door, only for E.J.J. to re-open it and continue to verbally assault the police. *Id.* Eventually the police arrested E.J.J. for obstruction. *Id.* The Washington State Supreme Court ruled:

“That E.J.J.'s behavior may have caused a minor delay is of no import. Although the officer's request that E.J.J. return to his home and close both doors might have been an attempt for a more convenient resolution of the situation, ‘[s]tates cannot consistently [sic] with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances.’ In the First Amendment context, we must be vigilant to distinguish between obstruction and

inconvenience.” E.J.J., at 506(quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-502, 69 S. Ct. 684, 690, 93 L. Ed. 834 (1949)). (emphasis added).

In *State v. Bessette*, the Washington Court of Appeals held that the defendant could not be convicted of obstruction for refusing to allow police to enter his residence without a warrant in order to arrest a third party. *State v. Bessette*, 105 Wash.App. 793 (2001). The court held a citizen does not commit the crime of obstructing when he exercises his right under the Fourth Amendment and Article 1 Section 7 of the Washington Constitution to refuse to allow police warrantless entry in his home. *Id.* at 800.

Another example of an act that did not amount to obstructing occurred in *State v. Mendez*. In *Mendez*, police instructed a vehicle passenger to stay where he was after police stopped the vehicle, but the passenger ran away and was ultimately convicted of obstruction for doing so. *State v. Mendez*, 137 Wn.2d 208 (1999). The Washington Supreme Court held that, absent reasonable suspicion or danger to an officer, police may not detain a vehicle’s passenger without individualized reasonable suspicion. Therefore, the defendant’s act of leaving the vehicle when police had no legal basis to detain him did not constitute obstructing. *Id.* at 225.

Just recently the Division 3 Court of Appeals weighed in on the issue. The Court held that “there is no general obligation to cooperate with a

police investigation. **Whenever such a duty exists, it frequently is imposed by statute**...where the suspect is personally the target of the investigative detention, we think the lack of an obligation to assist the police precludes use of the obstructing statute to enforce cooperation.” State v. D.E.D., 200 Wash. App. 484, 495, 402 P.3d 851, 857 (2017). **(Emphasis added)**. D.E.D. was not guilty of obstructing for passively resisting detention when he was not under arrest. Id.

Steen appears to take this same position, but then rules contrary to it.

Buried in a footnote, the Court in Steen noted that:

We do not hold, as the dissent suggests, that “private citizens have an affirmative obligation to assist police when they are performing their community caretaking function.” Dissent at 915 n. 15. Private citizens have no such affirmative duty. Nor do we hold, as the dissent suggests, that private citizens commit obstruction of a law enforcement officer “every time they refuse to assist the police in performing their community caretaking function.” Dissent at 916. **A citizen's mere refusal to assist police officers performing their community caretaking duties, without more, is not a crime under the plain language of the obstruction statute.** See footnote 8 in State v. Steen, 164 Wash. App. at 802, 265 P.3d at 908 **(emphasis added)**.

Even though Steen had no obligation to assist police, he was still found guilty for not assisting the police. This makes the decision both confusing and misleading.

The Washington legislature has the authority and responsibility of determining when a person has a duty to act. RCW 46.61.020-021 and

RCW 46.63.020 require all drivers and pedestrians to provide information necessary to enforce the traffic codes. RCW 9A.76.040(1) Prohibits a person who is being lawfully arrested from resisting the arrest. RCW 9A.76.060 prohibits a person from knowingly preventing the apprehension of another person who committed a crime. There is no statute that requires a person to assist police officers conduct a warrantless search.

By not unlocking the door, McLemore did not disobey a lawful order. The officer's can ask him to unlock the door, but there is no authority that requires him to do it. McLemore has no duty to act. If the officers believe they have the right to enter without a warrant, there is no statute, ordinance, or case law that requires McLemore to assist the officers. If the officers believed they had the right to enter, then they can use force to do so. The inconvenience to the officers for having to execute a warrantless search does not amount to obstructing.

Considering all reasonable inferences from the evidence most favorably to the City, there was insufficient evidence to prove that McLemore was guilty of obstructing. If the City's pleadings were insufficient to establish a prima facie case for each element of the crime charged, then the court should have dismissed the case prior to trial. State v. Knapstad, 107 Wn.2d 346, 352-53, 729 P2d 48 (1986).

5. CONCLUSION

Under the 4th Amendment of the US Constitution and Article I, Section 7 of the Washington Constitution a person has the right to refuse entry of an officer during a warrantless search and not be subject to punishment for attempting to exercise that right. A person's right to privacy in their home is not *de minimis* and officers cannot just demand that a person exit their house for inspection when he has not committed any crimes.

There is no precedent in this state that requires a citizen to assist officers in a warrantless search of their home. Nor is there any statute that punishes a person for refusing to allow officers entry into a home during a warrantless search.

For these reasons, McLemore respectfully requests that this court reverse the decision of the lower court and dismiss the charges.

Dated this 7th day of September, 2018.

Respectfully submitted,



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