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SUPREME COURT NO. 95858-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOISSELLE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry Costello, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ARGUMENT

1. BOISSELLE'S FOURTH AMENDMENT CLAIM
WARRANTS APPELLATE RESOLUTION.

The right to appeal is guaranteed under the Washington
Constitution:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed **and the right to appeal in all cases[.]**

Wash. Const. art. I, § 22 (emphasis added).

Included in the right to appeal is the right to have the appellate court consider the merits of the issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). A defendant has the right to appellate review of the trial court's findings of fact for substantial evidence and its conclusions of law de novo. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

Here, Boisselle argued the warrantless entry into his home violated his Fourth Amendment right to be free from unreasonable searches and seizures. Boisselle's opening brief addressed this

federal constitutional claim separately from his state law constitutional claim for 26 pages of his opening appellate brief (BOA) and 4 pages of his reply brief (RB). BOA at 27-53; RB at 6-10. He cited approximately 25 federal cases¹ and argued that under the great weight of this authority, the warrantless entry into his home was illegal. BOA at 48-53.

Boisselle argued that because the officers' initial entry was unlawful, the subsequent warrant was tainted. Everything observed and subsequently seized should have been suppressed under the

¹ See e.g. Matalon v. Hynnes, 806 F.3d 627 (1st Cir. 2015) (undecided whether exists outside automobile searches); Harris v. O'Hare, 770 F.3d 224 (2nd Cir. 2014) (undecided whether exists outside automobile searches but officer's belief acting as a community caretaker insufficient); Ray v. Township of Warren, 626 F.3d 170 (3rd Cir. 2010) (does not apply outside automobile searches; warrantless entry must fit within already recognized exception); United States v. Taylor, 624 F.3d 626 (4th Cir. 2010) (emergency aid doctrine, as part of officer's community caretaking role, can justify warrantless entry); United States v. York, 895 F.2d 1026 (5th Cir. 1990) (community caretaking can justify warrantless entry when there is immediate threat); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) (community caretaking justified warrantless entry to abate noise nuisance), but cf. United States v. Williams, 354 F.3d 497 (6th Cir. 2003) (casting doubt on whether community caretaking will ever justify warrantless entry into home); United States v. Pichany, 687 F.2d 204 (7th Cir. 1982) (does not apply outside automobile searches); United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006) (community caretaking can justify warrantless entry when there is reasonable belief emergency exists); United States v. Bradley, 321 F.3d 1212 (9th Cir. 2003) (emergency aid doctrine, as part of officer's community caretaking role, can justify warrantless entry); United States v. Bute, 43 F.3d 531 (10th Cir. 1994) (does not apply outside automobile searches); United States v. McGough, 412 F.3d 1232 (11th Cir. 2005) (community caretaking may justify warrantless entry if there is immediate threat or exigent circumstances); Corrigan v. District of Columbia, 841 F.3d 1022 (D.C. Cir. 2016) (community caretaking may justify warrantless entry if circumstances indicate need for immediate action; officers' delay in acting belies need for immediate action).

exclusionary rule. BOA at 53 (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

In response, the state made no argument that an exception to the exclusionary rule applied if the court were to find the initial entry illegal. Brief of Respondent (BOR). Indeed, the state conceded in the trial court that if the trial court were to find the initial entry illegal, the subsequent search warrant issued as a result would be defective. RP 287.

Despite this, the appellate court declined to consider the Fourth Amendment claim on grounds Boisselle had not sufficiently briefed why the exclusionary rule applied:

It is for this reason that we decline to address Boisselle's contention that the search of his residence was illegal under the Fourth Amendment. The exclusionary rule is a prudential doctrine created by the United States Supreme Court. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed. 2d 285 (2011) (quoting Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976)). Rather, the exclusionary rule's purpose is to deter future Fourth Amendment violations. Accordingly, under Fourth Amendment jurisprudence, application of the rule does not follow a warrantless search when, among other instances, the police act with an objectively reasonable good faith belief that their conduct is lawful or when their conduct involves "isolated" negligence. Davis, 564 U.S. at 236-39, 131 S.Ct.

2419 (quoting Herring v. United States, 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed. 2d 496 (2009)).

Although he argues that the warrantless search of his residence was illegal under the Fourth Amendment, Boisselle assumes—without analysis—that the application of the exclusionary rule must necessarily follow. This is not a complete analysis of Fourth Amendment jurisprudence. On this briefing, Boisselle does not present a suitable opportunity for reasoned decision-making. Accordingly, his Fourth Amendment claim does not warrant appellate resolution. See, e.g., State v. Johnson, 119 Wash.2d 167, 171, 829 P.2d 1082 (1992) (“Parties raising constitutional issues must present considered arguments to this court.”); RAP 10.3(a)(6).

State v. Boisselle, 3 Wn. App.2d 266, 277 n.6, 415 P.3d 621, 627, review granted, 424 P.3d 1210 (Wash. 2018).

But it is the government that bears the burden to prove an exception to the exclusionary rule. See e.g. United States v. Corral-Corral, 899 F.2d 927, 932 (10th Cir. 1990) (“[t]he government, not the defendant, bears the burden of proving that its agents' reliance upon the warrant was objectively reasonable.”) (quoting United States v. Michaelian, 803 F.2d 1042, 1048 (9th Cir.1986)). Here the government never argued good faith and seemingly conceded it did not apply.

The failure of the appellate court to decide Boisselle's federal constitutional claim is of no minor significance. In fact, it

may preclude him from obtaining later relief in federal court. See e.g. Corwin v. Johnson, 150 F.3d 467, 472 (5th Cir. 1998) (if a state court decision rejecting a federal habeas petitioner's constitutional claim rests on an adequate and independent state procedural bar, and does not fairly appear to rest primarily on federal law, the federal court may not review the merits of the federal claim absent a showing of cause and prejudice for the procedural default, or showing that failure to review the claim would result in a complete miscarriage of justice). This Court should therefore decide the merits of Boisselle's Fourth Amendment claim.

2. THIS COURT SHOULD REJECT THE STATE'S PROPOSED "DEAD BODY" EXCEPTION TO THE WARRANT REQUIREMENT AS IT IS UNWARRANTED AND RIPE FOR ABUSE.

As the state concedes, "the recovery of human remains does not fit the 'emergency' exception in a tidy way." SBOR at 5. "A dead body does not 'need assistance' and is not always accompanied by 'an imminent threat of substantial injury to persons or property.'" SBOR at 5. Boisselle agrees with the state, Judge Spearman's dissent, the trial court's conclusion that the circumstances of this case did not meet the emergency exception to the warrant requirement as articulated by this Court in State v.

Smith² and State v. Schultz.³ State v. Boissele, 3 Wn. App.2d at 296-97 (Spearman J., concurring) (disagreeing with majority's effort to "shoehorn" the facts into the emergency aid exception); CP 46 (trial court found the officers did not believe they were responding to an emergency).

Assuming arguendo there are circumstances where the possibility of a dead body inside a residence could constitute an emergency,⁴ this is not one of them. Those cases require the

² In State v. Smith, this Court held law enforcement officials may make a warrantless search of a residence if:

- (1) it has a reasonable belief that assistance is immediately required to protect life or property, (2) the search is not primarily motivated by an intent to arrest and seize evidence, and (3) there is probable cause to associate the emergency with the place to be searched.

State v. Smith, 177 Wn.2d 533, 303 P.3d 1047 (2013).

³ In State v. Schultz, this Court held a police officer may make a warrantless search of a residence if: (1) the officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched; (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property is in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. State v. Schultz, 170 Wash. 2d 746, 754-55, 248 P.3d 484, 488 (2011) (adopting latter three requirements from State v. Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007)).

⁴ See e.g. United States v. Stafford, 416 F.3d 1068, 1074 and n.3 (9th Cir. 2005) (the report of a dead body in an apartment unit covered in blood and feces with needles littering the floor gave police officers a reasonable belief that an emergency was at hand and that assistance was necessary, as would justify a warrantless entry and search of the apartment under the emergency doctrine,

officers still have a subjective belief that either the “body” might not be quite dead or that injured persons or a murderer might be present. United States v. Stafford, 416 F.3d at 1079 (Canby, Circuit Judge, dissenting in part) (citing cases).

Here, however, the sergeants had not observed anything “to confirm that anyone inside was in need of immediate assistance.” RP 46, 75-76, 101. The officers did not summon aid and waited an hour and a half to go in. RP 44, 73-74, 101. Under these circumstances, the trial court found the officers did not believe they were responding to an emergency. CP 46. This is a verity on appeal. Rush v. Blackburn, 190 Wash. App. 945, 956, 361 P.3d 217, 222 (2015).

As for the community caretaking exception, the state makes a similar concession: “[t]he entry into a home to recover human remains is difficult to shoehorn into [the community caretaking exception],⁵ because aid cannot be rendered to a dead body” and

where officers confirmed the report with eyewitnesses before entering the apartment).

⁵ A search pursuant to the community caretaking function must be totally divorced from a criminal investigation. State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000); Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). This Court has held that to establish the community caretaking exception, the government must show: (1) the officer subjectively believed someone needed health or safety assistance, (2) a reasonable person in the same situation would believe there was a need for assistance, and (3) there was

because it “may also prove difficult to ‘divorce’ the need to recover the body from the agency (perhaps criminal) which caused death.” SBOR at 6.

But because there is a public interest in recovering dead bodies, the state suggests a new rule:

Under the community caretaking exception to the warrant requirement, if officers have a sincere and well-founded or reasonable concern that unattended human remains are present in a place, and that there is probable cause to associate that concern with that place, then the officers may make a limited sweep of that place to verify or dispel that concern.

SBOR at 7. The state cites no authority for this new rule other than to say, “This case demonstrates the utility for such a rule.” Id.

The state’s proposed rule should be rejected for several reasons. First, the state has not argued that this Court’s prior decisions interpreting the emergency aid or community caretaking exceptions are incorrect or harmful. Stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Lucky, 128 Wash.2d 727, 735, 912 P.2d 483 (1996) (citing In re Stranger Creek, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)).

a reasonable basis to associate the need for assistance with the place being searched. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

Second, contrary to the state's argument, this Court did not adopt a brand new sui generis community caretaking exception in State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016). Rather, the court applied well-settled case law holding that a warrantless search may be justified when officers have reasonable grounds to believe that "objects likely to burn, explode or otherwise cause harm" need to be secured. Duncan, 185 Wn.2d at 440-441 (citing State v. Downey, 53 Wn. App. 543, 544-45, 768 P.2d 502 (1989) (citing Robert Utter, Survey of Washington Search and Seizure Law: 1988 Update, 11 U. Puget Sound L. Rev. 421, 538-39 (1988)). This Court cautioned that community caretaking is a strictly limited exception to the warrant requirement and noted that it was "confident that the desire to remove an unsecured gun from the vehicle was not here used as a pretext for an otherwise unlawful search." Duncan, at 144. Under the facts here, the Court cannot be so confident. Sergeant Adamson testified the warrantless search was motivated in part to see if they had a crime scene. RP 118.

Third, the state's "dead body" exception should be rejected because the state is proposing that the government search is justified regardless of whether the officers' *primary motivations* are to search for evidence of a crime:

The "primary purpose" test of State v. Smith, 177 Wn.2d 533, 541-42, 303 P.3d 1047 (2013) may have utility in the emergency context where the officers have little time for self-reflection, but in a case like this, where the officers are on the outside trying to figure out what to do with a possible dead body inside, such a rule requires them to consider their own "primary purpose" before taking action. Such a self-referential rule is decidedly unhelpful.

SBOR at 4.

Similarly, the state claims that "Whether criminal agency is suspected, or not, the need to humanely recover the dead body remains a constant community caretaking need. SBOP at 6. The state cites Clarkson's testimony: "you can't just walk away from something like that; if we did, there would be a lot of rotting dead bodies in Pierce County." SBOR at 6 (citing VRP 46). Boisselle posits in the next argument section officers could have and should have obtained a warrant.

Regardless, the state's proposed rule is ripe for abuse. The state is essentially arguing that anytime someone utters the words "dead body," the police have *carte blanche* to search a private

residence. This proposal does not adequately protect citizens from unreasonable police intrusion. See e.g. State v. Johnson, 104 Wn. App. 409, 418, 16 P.3d 680 (2001) (two competing policies come into play when the emergency aid exception is invoked: “(1) allowing police to help people who are injured or in danger, and (2) protecting citizens against unreasonable searches.”). In the context of rendering aid, the “primary motivation” requirement provides a proper balance between these competing interests.

Not only is the state’s “dead body” exception ripe for abuse by government officials, but it is ripe for abuse by citizens as well.

The First Circuit has cautioned:

This is distinctly not a case in which the raw question is presented of whether police may barge into someone's home or even motel room merely based on the receipt of a tip that there is a dead body inside. The concerns raised by such a scenario are very serious. Anonymous tips, without more, do not justify free-wheeling police action. J.L., 529 U.S. at 270, 120 S.Ct. 1375.^[6] It is easy for someone to make an anonymous 911 call to the police with a false report of a dead body in a room in order to set up the people in that room. This case shows exactly that: Beaudoin and Champagne were set up by the anonymous tipster. Equally, though, society expects police to investigate reports of dead bodies, and to do so promptly. The reportedly “dead” body might yet be alive and prompt action could save the person. See Wayne, 318 F.2d at 212 (“Acting in

⁶ Florida v. J.L., 529 U.S. 266, 270-71, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000).

response to reports of 'dead bodies,' the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients.... Even the apparently dead often are saved by swift police response.”^[7]

We emphatically do not create an anonymously reported murder scene exception to the warrant requirement, nor do we adopt a broad emergency aid doctrine, as defendants fear. There are valid concerns about the harm to Fourth Amendment interests from a generous interpretation of the emergency doctrine as an exception to the warrant requirement. This case does not, in the end, turn on the emergency doctrine alone but turns also on the exigent circumstance of risk to the officers, a risk that justified telling Beaudoin to step out of the doorway and is a justification for the *Terry* doctrine. From that, all else followed.

United States v. Beaudoin, 362 F.3d 60, 70–71 (1st Cir. 2004), cert. granted, judgment vacated (on other grounds) sub nom. Champagne v. United States, 543 U.S. 1102, 125 S. Ct. 1025, 160 L. Ed. 2d 1009 (2005).

This Court should reject the state’s proposal to invite “free-wheeling police action.” Id. For all the reasons stated above, this Court should reject the state’s proposed sui generis “dead body” exception.

⁷ Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963 (Burger, J.)).

3. TAKEN TOGETHER, THE FACTS KNOWN BY THE OFFICERS AT THE TIME OF THE SEARCH REQUIRED THEM TO GET A WARRANT.

A warrantless search pursuant to the community caretaking function must be totally divorced from a criminal investigation. Kinzy, 141 Wn.2d at 386; Cady, 413 U.S. 433. Based on the sergeants' testimony, the deputies here did not enter solely in a caretaking capacity. The community caretaking exception therefore did not apply.

Recognizing this, the state essentially argues that unless this Court adopts its proposed "dead body" exception, Zomalt's body would have been unrecoverable. The state is incorrect.

The same facts recited by the state as giving the officers "reasonable concern that a dead body was decomposing within the house" also gave the officers probable cause to believe they had a crime scene. See SBOR (reciting facts with citations to the record).⁸

⁸ Zomalt went missing on August 13, 2014. RP 516, 524. The search of Boisselle's home occurred on September 1, 2014. RP 716.

The state appears to suggest that because the officers did not believe they had probable cause to get a search warrant, that they were left with no choice but to enter without one. See SBOR at 9. Under both the federal and state constitutions, the probable cause standard is an objective one. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); Beck v. Ohio, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). The officer's subjective belief is not determinative. State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698 (1992), review denied, 119 Wn.2d 1007, 833 P.2d 387 (1992). Whether the deputies believed they could not get a warrant is therefore of no significance. It does not excuse their failure to apply for one.

A search warrant should be issued if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Thein, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy. See generally Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)

(probable cause must be based on more than mere suspicion). The affidavit should be evaluated in a commonsense manner, rather than hypertechnically. State v. Jackson, 150 Wash.2d 251, 265, 76 P.3d 217 (2003) (citing State v. Vickers, 148 Wash.2d 91, 108, 59 P.3d 58 (2002)). An affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. Id. Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. Thein, 138 Wash.2d at 140, 977 P.2d 582.

There was probable cause to believe Michael Boisselle was involved in Zomalt's disappearance/homicide and that evidence of that crime would be found at the residence searched. They lived together at the residence at the time of Zomalt's disappearance. A 911 call reported "Mike" said he shot someone at the residence and that it was "self defense."⁹ Another 911 call reported a dead body at the residence. An unknown individual was seen burning bloody carpet in which Zomalt's DNA was located. The amount of blood was such that homicide appeared likely. The officers observed torn-up carpet in Boisselle's living room and upturned furniture.

The officers smelled something foul. Although a single fact in isolation may not be sufficient, probable cause may exist when that fact is read together with other facts stated in the affidavit. Vickers, 148 Wn.2d at 110. These facts taken together provided probable cause to believe bloody carpet connected with Zomalt's homicide would be found at the residence.

Regardless, there is more investigation the officers could have done to shore up an application for a search warrant. They could have confirmed the identity of the 911 caller so that his tip would not be anonymous. Significantly, police were able to contact this person on September 4, 2014. RP 962. Police also could have contacted the bank that foreclosed on the old owner to obtain consent to enter. RP 92.

In short, the deputies' subjective belief they could not get a warrant does not excuse their failure to do so. Because the deputies were not acting solely as caretakers completely divorced from a criminal investigation, their entry was unlawful.

⁹ As the state notes, evidence of self defense is irrelevant in a probable cause inquiry. SBOR at 10, n.5.

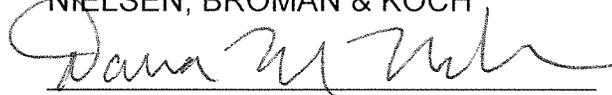
D. CONCLUSION

This Court should decline the state's invitation to fashion a new exception to the warrant requirement. The state should not get to change the rules simply because it failed to carry its burden of proof.

Dated this 15th day of October, 2018

Respectfully submitted

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