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No. 66443-3-I
King County Superior Court No. 09-1-05551-0 KNT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

RENE J. SANTIAGO,
Defendant-Appellant.

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

The Honorable Cheryl Carey, Judge

APPELLANT'S REPLY BRIEF

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I.
STATEMENT OF THE CASE

The State concedes that the CPS investigation in this case was “non-emergent.”

Interestingly, the State notes that the CPS referral included a claim that “there had been a prior drug-related criminal complaint (although no charges were filed after the police had searched the home).” BOR at 7-8, citing Pretrial Ex. 2 at 2, 6. No police officer, however, testified that there had ever been a previous search of the house. This suggests that the referent was either ill-informed or deliberately concocting allegations against Santiago. Alternatively, if the allegation is true, it is further evidence that the police were actively pursuing a criminal investigation of the Santiago home. That contradicts the State’s position that the officers’ sole motivation for entering the house on February 28, 2008, was to check on the welfare of Santiago’s daughter, L.S.

II. ARGUMENT

A. ANY EVIDENCE FOUND IN THE HOME SHOULD HAVE BEEN SUPPRESSED AS FRUITS OF AN ILLEGAL SEARCH

1. The Officers' Warrantless Entry Into the Home was a "Search," Regardless of Their Purpose

In the State's view, the officers' initial warrantless entry into the home was not a search at all, because the purpose of the entry was to check on a child's welfare. BOR at 21-26. The State correctly notes that the trial court agreed with this reasoning.

Here, because the police accompanied CPS to Santiago's home for the sole purpose of checking on two-year-old L.S.'s welfare, the trial court properly concluded that the only search that occurred was later, pursuant to a lawfully issued search warrant.

BOR at 21.

In his opening brief, Santiago cited state and federal cases holding that the government's entry into a home is a "search" under the Fourth Amendment and Article I, section 7 of the Washington Constitution, even when the purpose is not to investigate crime. *See* AOB at 19-20. The State does not respond to this authority at all, but simply ignores it.

Instead, the State relies on *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), and *State v. Bustamante-Davila*, 138 Wn.2d 964, 983

P.2d 590 (1999). It is true that these cases draw a distinction between the *level* of protections needed based on the purpose of the search. But neither case suggests that the protections completely disappear when the entry into a home is for a non-criminal purpose.

The question presented in each case was what type of warnings police must give prior to obtaining consent to enter a home. In *Ferrier*, the court held that Article I, section 7 requires police officers conducting a “knock and talk” procedure to inform residents that they have the right to refuse consent to search, that they may revoke that consent at any time, and that they may limit the scope of their consent. 136 Wn.2d at 118-19. In *Bustamante-Davila*, the court declined to require the *Ferrier* warnings when the police seek entry into a home for a purpose other than investigation of crime. But the court nonetheless required the State to prove that the resident voluntarily consented to the entry, and that the contraband ultimately seized from the home was in “plain view.” 138 Wn.2d at 980-82. If the initial entry did not infringe on a constitutionally protected privacy interest, there would have been no need to determine whether the “consent” and “plain view” exceptions to the warrant requirement applied.

In fact, the law is clearly established that *any* governmental entry into a home is subject to the protections of the Fourth Amendment. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (San Francisco Department of Public Health official’s warrantless entry into an apartment building for a “routine annual inspection” violated Fourth Amendment). The Ninth Circuit has expressly addressed the very situation the State maintains is presented here: a social worker’s entry into a home for the sole purpose of checking on a child’s welfare. *See Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999). In that civil rights action, the defendants argued that “a search warrant is not required for home investigatory visits by social workers.” *Id.* at 813. The court flatly rejected this notion, holding that “it was settled constitutional law that, absent exigent circumstances, police could not enter a dwelling without a warrant even under statutory authority where probable cause existed.” *Id.* at 813 (quoting *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986)). “The Fourth Amendment preserves the “right of the people to be secure in their persons, houses” without limiting that right to one kind of government official.” *Calabretta*, 189 F.3d at 813-14. *See also Walker v. King County*, 630 F.Supp.2d 1285, 1291 (W.D. Wash. 2009) (State conceded that warrantless entry into home to conduct CPS

investigation was a search under Fourth Amendment), *aff'd*, 376 Fed.Appx. 704 (9th Cir. 2010).

It follows with greater force that Article I, section 7 applies to the entry of a home for purposes other than investigation of crime, since it unequivocally states that no home may be “invaded” without authority of law. For example, in *State v. Jesson*, 142 Wn. App. 852, 177 P.3d 139, *rev. denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008), a deputy went to the defendant’s rural home to interview him as a potential witness in a criminal investigation. Once at the home, the officer observed a marijuana grow operation. The Court determined that the home’s curtilage was not impliedly open because the driveway was gated and had “no trespassing” signs. The officer’s entry was therefore a warrantless search under the state constitution and all evidence seized pursuant to a subsequently obtained search warrant had to be suppressed. Similarly, in *State v. Browning*, 67 Wn. App. 93, 96, 834 P.2d 84 (1992), the court held that a warrantless entry into a home by a building inspector who subsequently observed a marijuana grow operation constituted a search under both the state and federal constitutions.

Thus, the government in this case clearly “searched” and “invaded” Santiago’s home regardless of the purpose of its entry.

2. Anthony's Conduct did not Amount to Consent to Enter Rene's Home

The State has the burden to prove an exception to the warrant requirement, such as consent. *See* AOB at 18. Here, the State's case is based on four words uttered by Detective Tschida: "He [Anthony Santiago] invited us in." 1RP 95. The State repeats that quote like a mantra throughout its discussion. *See* BOR at 34-37. It is clear from the context, however, that Tschida was merely giving his opinion of how Anthony's conduct should be interpreted. He was not claiming that Anthony expressly invited the officers into the home. The relevant portions of Tschida's testimony are as follows:

Q [by the prosecutor] Okay. What did you see when the garage door opened?

A Uh, there was a single male inside the garage.

Q Okay.

A And I explained to him why we were there. I said we were here to (inaudible), we're where with (inaudible), we're here to check on the child and then talk to Ruby.

Q Okay. And how did he respond?

A *He invited us in.* He turned around and walked into the house.

Q Okay.

A Through the interior door of the garage.

Q *And you said that he invited you in. Do you recall if he verbally invited you in or was it sort of implied by, you know, him turning around and walking? How did that all work?*

A *I -- he turned around and walked in. And I don't recall. It's been two and a half years.*

Q Sure.

A So I had in my report that he invited us in. *I don't remember what the words -- what words he said or if he said words at all.*

Q Okay. And so how physically were you able to get into the house?

A We followed in the door and we just walked right in.

Q Okay. So who opened the door?

A It was -- when the garage door was open and he walked in, *he opened the door going into the garage and then we just followed in right with right in with him.* And as you walk in, (inaudible) entry from the garage is on the main entry hallway to the house. And he walked (inaudible) the living room and I was going over to talk to him while -- oh, and I (inaudible) said earlier. Officer Clement was with us, too --

1RP 95-96.

A little later the prosecutor attempted to develop further details to support consent:

Q Okay. I want to back up just a second and get a little bit more detail about how -- you said that Anthony walked into the house and you all followed him.

A Yes.

Q How did -- how did he walk into the house? I mean, did he walk, did he run, did he -- how did he get from the garage back into the house?

A When I told him why we were there, he just turned around and walked like a normal person right back into the house.

Q Okay. And you and the other officers followed?

A Yes.

Q *It sounds like he opened the door and you all went in?*

A *Yes.*

Q Uhm, and I don't know if you remember this. I'm trying to just get as much detail as possible. Did he have to hold the door open for all of you to get in or was it just a door that stays open?

A I don't recall.

1RP 98.

On cross-examination, Tschida stated that he has been trained to write complete reports and that he did so in this case. Even after reviewing his report, he could not provide any detail that would support his conclusion that Anthony invited the officers in.¹ Rather, he simply repeated that Anthony walked into the home and the officers followed

¹ The State maintains that the trial court could rely on the report as well as on the detective's testimony. Even if that were true, it makes no difference because the written report likewise contains the bare conclusion that Anthony "invited" the officers in, with no supporting facts.

him. 1RP 117. He also acknowledged that he gave Anthony no warnings regarding his right to refuse entry.² 1RP 117-18.

Thus, Tschida's statement that Anthony "invited" the officers into the house was merely his opinion of the legal effect of Anthony's conduct. It is entitled to no more weight than, for example, an officer's statement that "I had probable cause to arrest." In either case, the court must look to the actual facts to determine whether the legal standard has been met.

Neither the CPS social worker nor any of the other officers involved in the search offered any additional evidence that could support a finding of consent. *See* AOB at 8-9.

The State appears to argue that Anthony *must* have said something to indicate his consent – even though no officer could now recall it – because otherwise Detective Tschida would not have written in his report that Anthony invited the officers in. BOR at 37 (last paragraph). It cites no authority that the courts may make such a logical leap. It is the State's burden to prove that Anthony consented. It cannot meet that burden by arguing that the officers must have forgotten the key facts.

² Even when *Ferrier* warnings are not mandatory, the lack of such warnings must be considered when deciding whether a resident voluntarily consented to entry. *See Bustamante-Davila*, 138 Wn.2d at 981.

As discussed in the AOB at 20-25, Anthony's interaction with the officers cannot legally be interpreted as consent, particularly in view of the Supreme Court's recent decision in *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). This is true even if the Court accepts the version of the facts most favorable to the State.

3. “Community Caretaking” did not Provide an Independent Basis for Entering the Home

The State concedes that it cannot justify the officer's entry into the house under the “emergency aid exception” set out in *State v. Schultz*, *supra*. BOR at 31, n.4. It argues, however, that officers should be permitted to enter a home without permission and in the absence of an emergency when the purpose of the entry is a routine check on health and safety. It cites no authority whatsoever for that proposition. In his opening brief, Santiago explained that all federal circuits, and the Washington courts, have uniformly rejected the notion that government officials may enter a home without a warrant – even for the purpose of a routine welfare check – in the absence of a true emergency. *See* AOB at 25-32. The State does not attempt to distinguish this body of case law; it simply ignores it.

The State does not rely on a single case involving entry into a home. Rather, it cites to cases such as *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003), and *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001), both of which involved police encounters with juveniles on public streets.

It is true, as the State points out, that the police may engage in community caretaking functions such as “delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid.” BOR at 27 (citations and internal quotation marks omitted). Such actions do not implicate constitutional protections at all if the police remain in a public place and do not restrict a citizen’s freedom of movement. Further, the police may under some circumstances temporarily detain a citizen, or examine some of her property, in the interest of health and safety and in the absence of an emergency. *See* AOB at 25-29. Every court to address the issue, however, has required a higher standard to justify entry into a home. In fact, the Ninth Circuit and the Western District of Washington have specifically found the Fourth Amendment to require a warrant for CPS investigations indistinguishable

from the one in this case. *See Calabretta v. Floyd*, supra; *Walker v. King County*, 630 F.Supp.2d at 1291.³

The State's efforts to distinguish *State v. Schultz* are unavailing. For one thing, the existence of a valid health and safety concern – completely divorced from a criminal investigation – is *part* of the *Schultz* standard. *Schultz*, 170 Wn.2d at 754-55. It is illogical, therefore, to suggest that *Schultz* does not apply when the government is motivated by a concern for the welfare of a young child.

4. The Emergency Aid Exception to the Warrant Requirement does not Apply Here

As noted above, the State concedes that it cannot meet the test set out in *State v. Schultz*.

5. The Search Warrant Affidavit is Invalid Because it was Based on Information Illegally Obtained During the Prior Search

The State does not dispute that, without the information obtained during the search of Santiago's home, the search warrant was invalid. It relies solely on its arguments that the officers properly entered the home prior to obtaining the warrant.

³ There does not appear to be any published Washington case dealing with the precise facts presented here but, of course, Washington's constitutional standards are more

B. DOL RECORDS CONCERNING ANTHONY SANTIAGO WERE IMPROPERLY ADMITTED INTO EVIDENCE

As explained in the opening brief at 40-41, the documents should not have been admitted for impeachment purposes because Anthony never specifically answered the prosecutor's question about his current address. Thus, there was no testimony to impeach. Anthony did say that he was kicked out of Rene's house after the search, but he did not say where he was living at the time of the trial. *See* 6RP 787-88 (Anthony testified on direct that he was kicked out after the search; did not say where he was currently living); 6RP 788 (Anthony stumbles when asked his current address and prosecutor drops subject); 6RP 789 (Anthony testifies on cross-examination that he moved in with Rene shortly after Rene bought the house and had lived there for more than a year when the search occurred). No other questions were asked concerning Anthony's living arrangements. Impeachment concerning his address at the time of trial was improper because he never testified about his current address. *See* 5D Wash. Prac., Handbook Wash. Evid. ER 613, comment (3)(b) (2010-11 ed.) ("If a witness has not yet testified, or refuses to testify about a particular matter, the witness's prior out-of-court statements are

protective than the federal courts'.

inadmissible because there is no testimony to impeach.” (citation omitted)).

The State also claims that the court never released Anthony from his subpoena and the defense was free to recall him to testify. This is only partially correct. First, Anthony did not appear at trial pursuant to a subpoena. 6RP 782. Second, there is no indication in the record that Anthony was still in the courthouse after the DOL records were admitted. The State announced its intention to present the records after both Anthony and Rene testified and the jury was released for the day. 6RP 817-18 (jury released for the day, counsel instructed to return to court at 3:00 PM to work on instructions for the remainder of the day); 6RP 825-26 (prosecutor announces her intention to present DOL records after discussing jury instructions). The records were not actually presented until the next day. 6RP 845, 849.

The State is correct that an attorney no longer needs to draw a witness’s attention to a prior inconsistent statement prior to introducing extrinsic evidence of the statement. Instead, “courts have held that the rule is satisfied even if the witness is not asked about the prior statement on the stand, *so long as the witness is still available.*” *State v. Horton*, 116 Wn. App. 909, 915, 68 P.3d 1145 (2003) (quoting Roger C. Park et al.,

Evidence Law 436-37 (West Group Hornbook Series, 1998)) (emphasis added). Here, there is no indication that Anthony was still available to testify at the time the DOL records were admitted. Moreover, it was not defense counsel's responsibility to offer Anthony an opportunity to explain the prior inconsistent statement; it was the prosecutor's. *See Horton*, 116 Wn. App. at 916 ("it is sufficient for *the examiner* to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence." (quoting *State v. Johnson*, 90 Wn. App. 54, 70, 950 P.2d 981 (1998))) (emphasis added).

The State argues that admission of the records was harmless because the defense also impeached Anthony and the issue of his address was described by defense counsel as a minor detail. BOR at 43-44.

The harm caused by these records, however, was not that they impeached Anthony's testimony, but Rene's. Rene testified that he kicked his brother out. If the jury believed he was lying about that due to the DOL records, then his credibility was seriously undermined. That defense counsel described the DOL records as a minor detail to the jury is not surprising. Having lost his bid to keep the records out, he was attempting to minimize their impact as much as possible.

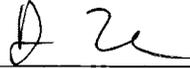
Nevertheless, the evidence likely had an impact on the deliberations. The DOL records were the last pieces of evidence the jury received before beginning deliberations and were highlighted by both the State and the defense during closing arguments. Thus, there is a reasonable possibility that the erroneous admission of the DOL records affected the trial's outcome. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is not harmless if, within reasonable possibilities, it affects the trial's outcome).

III. CONCLUSION

Because the search of Rene's home was unlawful, the Court should rule that the seized evidence should have been suppressed. Because there was no other evidence that could support guilt, the Court should remand with instructions to dismiss. In the alternative, the Court should reverse because of the improper admission of Anthony's driving records and remand for a new trial.

DATED this 22nd day of July, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

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